71887

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted].

No. [redacted] 156

ALBERT W. SHULTHIS, APPELLANT,

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY, AND GEORGE FRANKLIN BERRYHILL.

No. [redacted] 157

GEORGE FRANKLIN BERRYHILL, APPELLANT,

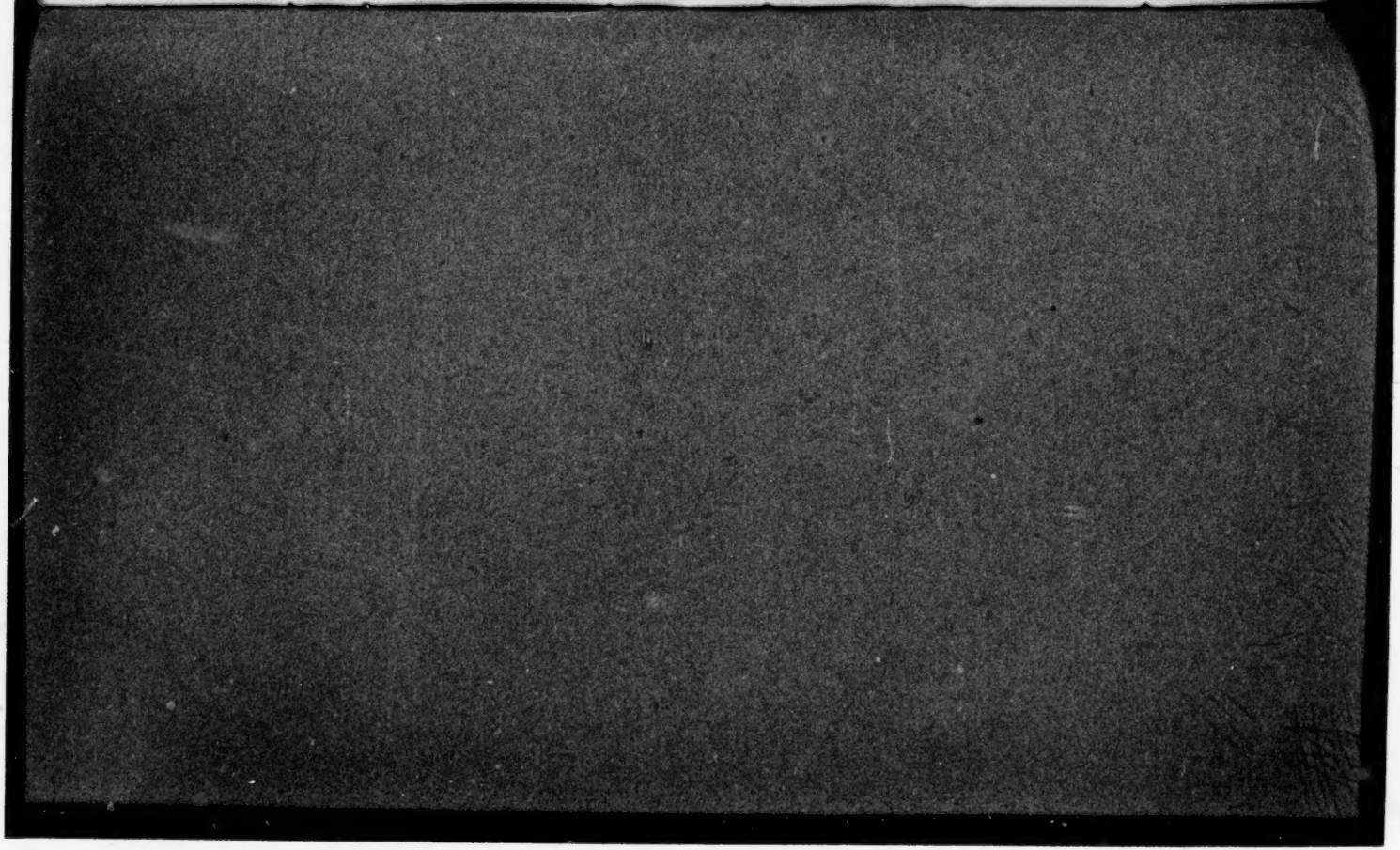
vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, AND THE KIEFER OIL & GAS COMPANY.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED NOVEMBER 20, 1920.

(21,900 and 21,901.)



(21,900 and 21,901.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909.

No. 674.

ALBERT W. SHULTHIS, APPELLANT,

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY, AND GEORGE FRANKLIN BERRYHILL.

No. 675.

GEORGE FRANKLIN BERRYHILL, APPELLANT,

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, AND THE KIEFER OIL & GAS COMPANY.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the May Term, 1909, of said Court, Before the Honorable William C. Hook, Circuit Judge, and the Honorable John A. Riner and the Honorable Charles F. Amidon, District Judge.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

Attest:

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Be it Remembered that hertofore, a transcript of record, pursuant to appeals allowed by the Circuit Court of the United States for the Eastern District of Oklahoma, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, in certain causes wherein Albert W. Shulthis was Appellant and D. A. McDougal, et al., were Appellees, which said cause was docketed in said Circuit Court of Appeals on July 3, 1908, as No. 2901, and wherein George Franklin Berryhill, Intervener, was Appellant, and Albert W. Shulthis, et al., were Appellees, which latter cause was docketed in said Circuit Court of Appeals on July 14, 1908, as No. 2905, which said transcript of record is in the words and figures following, to-wit:

a In the Circuit Court of the United States for the Eastern District of the State of Oklahoma.

Pleas and proceedings before the Honorable Ralph E. Campbell, Judge of the District Court of the United States for the Eastern District of Oklahoma, presiding in the Circuit Court in the case of—

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. C. McDougal et al, Defendants.

1 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Citation.

United States of America to D. A. McDougal, Edmond McKay, Perry McKay, The Kiefer Oil and Gas Company and George Franklin Berryhill, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit, to be held at the city of St. Louis, in the State of Missouri, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Oklahoma, wherein Albert W. Shulthis is complainant and D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company are defendants, and George Franklin Berryhill is the intervenor, to show cause, if any there be, why the decree mentioned should not be corrected, and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America this 9th day of June, 1908.

RALPH E. CAMPBELL.
United States District Judge presiding in the Circuit Court.

2 We, the undersigned Attorneys of record in the above entitled cause for the said defendants and for the said intervenor, hereby accept service of the foregoing citation on this the 13th day of June, 1908.

GEO. S. RAMSEY,
P. C. WEST,
Solicitors for Defendants.
S. V. O'HARE and
T. L. McCAIN.
Solicitors for Intervenor.

Equity No. 1. Albert W. Shulthis, Complainant vs. D. A. McDougal, et al., Defendants. Citation. Filed Jun. 13, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Thomas & DeMeules, for complainant.

3 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.
George Franklin Berryhill, Intervenor.

Citation.

United States of America to Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company,—Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Eighth Circuit to be held at the city of St. Louis, in the State of Missouri, within thirty days from the date of this writ, pursuant to an appeal filed in the Clerk's office of the Circuit Court of the United States for the Eastern District of Oklahoma, wherein Albert W. Shulthis is complainant and D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company are defendants, and George Franklin Berryhill is the intervenor, to show cause, if any there be, why the decree mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, this 9th day of June, 1908.

RALPH E. CAMPBELL.
United States District Judge presiding in the Circuit Court.

4 We, the undersigned Attorneys of record in the above entitled cause, for the said complainant and for the said defendants hereby accept service of the foregoing citation on this the 13th day of June, 1908.

C. L. THOMAS,
EDGAR A. DE MEULES,
Solicitors for Complainant.

GEO. S. RAMSEY,
P. C. WEST,
Solicitors for defendants.

Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, et al., Defendants. George Franklin Berryhill, Intervenor. Citation. Filed Jun. 13, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. O'Hara & McCain, for Intervenor.

5 Pleas before the Honorable Ralph E. Campbell, United States District Judge, Sitting as Judge of the United States Circuit Court for the Eastern District of Oklahoma at South McAlester on the 2nd day of June, 1908.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

On the 28th day of December, 1907, complainant herein files his bill of complaint in the Circuit Court of the United States for the Eastern District of Oklahoma, said bill of complaint being in words and figures as follows:

6 In the Circuit Court of the United States in and for the Eastern District of Oklahoma.

Albert W. Shulthis, Complainant,
vs. In Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Oklahoma:

Albert W. Shulthis, a citizen of the State of Kansas, brings this his bill against the defendants above named, and thereupon your orator complains and says:

1. That he is now, and was at all times herein mentioned, a citizen of the United States of America, and is now, and was

at all said times a citizen and resident of and within the State of Kansas.

2. That at all times herein mentioned the said defendants, D. A. McDougal, Edmond McKay and Perry McKay were, and each of them now is, a citizen of that part of the State of Oklahoma now comprising the Eastern District of Oklahoma.

7 3. That the defendant, Kiefer Oil and Gas Company, is a Corporation duly organized on the 26th day of April, 1907, under and by virtue of the laws of the United States in force in Indian Territory, having its principal place of business in said Territory. That said defendant existed under the laws of said Territory and was a citizen of said Territory up to and including November 16, 1907. That at all times since the admission of Oklahoma as a State, said defendant has been and now is a citizen and a resident of said State of Oklahoma, and a citizen and resident of the Eastern District of Oklahoma.

4. Your orator further shows that in the month of May, A. D. 1901, there was born to one George Franklin Berryhill and one Clementine Berryhill, husband and wife, a son, who was named Andrew J. Berryhill. That said George Franklin Berryhill is, and at all times herein mentioned was a Creek Indian and a citizen of the Creek Nation, and his name appears on the approved roll of the Creek Nation as a citizen by blood of said Nation. That the said Clementine Berryhill is not, and at no time has been a citizen of the Creek Nation. That the said Andrew J. Berryhill departed this life in the month of November, A. D. 1901, intestate and unmarried. That he left no issue, nor brother, nor sister surviving him. That thereafter, and on or about the 8th day of October, A. D. 1902, the name of the said Andrew J. Berryhill was duly placed on the approved Creek Indian roll of the said Creek Nation; and that thereafter there was allotted by the Commission to the Five Civilized Tribes to the heirs of the said Andrew J. Berryhill, deceased, the following described land, situated in the Creek Nation, and lying and being in the Eastern District of Oklahoma, to-wit:

The Northeast 1/4 of Northwest 1/4 of Section 18, and the East 1/2 of Northwest 1/4 of Northeast 1/4, and Southwest 1/4 of Northwest 1/4 of Northeast 1/4 of Section 13, Township 17 North, Range 12 East, and Lot One of Section 2, Township 16 North, Range 15 East, containing 120.15 acres more or less.

8 That thereafter, and on the 10th day of October, A. D. 1905, the United States of America, together with the Creek Nation did execute a deed or patent to said lands, wherein and whereby the United States of America and the said Creek

Nation did sell and convey unto the heirs of Andrew J. Berryhill, a Creek Indian, the above described land; that thereafter and on the 31st day of October, A. D. 1905, said deed or patent was duly approved by the Secretary of the Interior of the United States of America, and is recorded in Volume 2, at Page 504 of the records in the office of the Commissioner to the Five Civilized Tribes.

5. That on or about the 24th day of March, 1906, the said George Franklin Berryhill and Clementine Berryhill, were the owners in fee of that part of the above mentioned land described as follows, to-wit:

The Northeast Quarter (1/4) of the Northwest Quarter (1/4) of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian in Oklahoma.

That on or about the said 24th day of March, A. D. 1906, the said George Franklin Berryhill and Clementine Berryhill, for a valuable consideration to them in hand paid, did make, execute, acknowledge and deliver unto your orator, their certain indenture of lease, in quadruplicate, wherein and whereby they did demise, grant and let unto your orator, his executors, administrators and assigns, for the term of fifteen years from the date thereof, all of the oil deposits and natural gas in or under the lands last above described, together with other lands not herein considered, with the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas, and to occupy and use [se] much of the surface of said land as might be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining, and removing such oil and natural gas, including also the right to obtain from wells
9 or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas so far as it is necessary to the prosecution of said operations. That said lease was executed in quadruplicate by the said George Franklin Berryhill and Clementine Berryhill and your orator.

That on the 21st day of April, 1906, said lease was duly filed in the office of the United States Indian Agent, at Union Agency, Muskogee, Indian Territory, now Oklahoma; and on the 19th day of April, 1907, was duly approved by the said Secretary of the Interior.

That your orator further filed in the office of the said United States Indian Agent, a bond to accompany said lease, in all respects in accordance with the regulations of the said Secretary of the Interior. That on or about the 18th day of April,

1907, said bond was duly approved by the Secretary of the Interior.

That thereafter, the quadruplicate part of said lease was duly delivered to your orator by the said Secretary of the Interior, and was on the 18th day of May, 1907, filed for record in the office of the Clerk of the United States Court and ex-officio Recorder for the then existing Western Judicial District of the Indian Territory, at Sapulpa, and was duly recorded in the records of said office.

That on or about the 13th day of May, 1907, your orator in accordance with the said regulations of the said Secretary of the Interior, did pay into the hands of the said United States Indian Agent the advanced annual royalty provided for in said lease. That a true copy of said lease with the acknowledgment thereon, and with all indorsements thereon is attached hereto, made a part hereof, and marked "Exhibit 1."

5. That your orator has in all things duly complied with all regulations duly and legally prescribed by the said Secretary of the Interior relating to the leasing of lands of citizens of the Creek Nation for oil and gas mining purposes. That said regulations are here specially pleaded, and are as follows, to-wit:

"Leases (see also page 10).

"Sec. 5. No lease shall be approved for a greater term of years than as follows: Three years for grazing purposes ten years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, obe to be delivered to the lessee, and one to the lessor.

"Sec. 6. All leases must accurately described the lands, specify the rents or royalties and when the same are to be paid. and they must contain a provision to the effect that if the lessee shall fail to pay the rents and royalties or any part thereof when due, [orashall] fail to faithfully comply with the terms and conditions of the lease, such failure shall constitute a forfeiture of the lease and all improvements placed on the land by the lessee, and that the lessor shall be entitled to immediate possession of the leased lands and the improvements located thereon.

"All improvements placed on the lands by the lessee to an agricultural or grazing lease, or anyone holding under him as a sub-lessee, or otherwise, shall at the expiration of the lease, be and become the property of the owner of the land.

"This regulation is also applicable to all improvements and buildings placed upon lands leased for mineral purposes, except tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, casings of all dry or exhausted wells and machinery.

"All original lessees, except of mineral lands as hereinafter provided shall be required to furnish a bond executed by two or more sufficient sureties, each of whom must justify under an oath to an amount equal to the entire rental, guaranteeing the payment of all rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the indenture to be paid and performed by the lessee. Each mineral lease must be accompanied by an application, under oath by the lessee, upon blanks to be furnished by the agent. Each applicant will be required that the application is not made for speculation, but in good faith, and where the lease is for mining purposes, for mining a
11 mineral or minerals specified including oil and natural gas. A map must accompany each application therein showing the amount of land of each legal subdivision supposed to be underlaid with mineral, oil, or natural gas, as the case may be, and if mineral other than oil or natural gas, the quantity that can probably be mined. Applicants must furnish such other information as may be desired by the agent regarding their prospective operations. Applications by parties who do not themselves intend to conduct operations on the land will be rejected. Should the application be approved, bond will then be required as provided for hereinafter.

"In all mineral leases it must be provided that only so much of the surface of the land described as may be reasonably necessary to carry on the work contemplated may be occupied by the lessee.

"All original lessees of mineral lands shall be required to furnish a bond, with two or more sufficient sureties, or a responsible surety company, guaranteeing the payment of all royalties and rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the lease to be paid and performed by the lessee. Such bond shall be in amount as follows: For leases covering 40 acres and less than 80, $1000.00; for those covering 80 acres and less than 120, $1,500; and for those covering 120 acres and not more than 160, $2,000, and for each 40 acres tract or fractional part thereof, above 160 acres, an additional amount of $500; but the right is specifically reserved to increase the amount of such bonds above the sum named in any particular case where the Secretary of the Interior deems it proper to do so.

"No lease shall be sub-let, transferred, or assigned without the consent and approval of the Secretary of the Interior.

"All mineral leases shall provide for the payment of advanced annual royalty in sums of not less than 15 cents per acre per annum for the first and second years, 30 cents per acre per annum for the third and fourth years, and 75 cents per acres per annum for the fifth and each succeeding year thereafter, for the term for which the lease is to run, the sums thus paid to be a credit on the stipulated royalties should the same exceed in any one year the amount of the advanced payment.

"All oil and gas leases shall provide for the payment of a royalty of ten percent of the value on the leased premises of all crude oil extracted from said land, to be paid monthly, on or before the 25th day of the month succeeding that in which it is produced, and the average value of the oil during the month in which it is produced shall constitute the criterion for computing the royalty. The royalty on natural gas shall be fixed by the Secretary of the Interior at the end of each year, or oftener, in his discretion.

"All mineral lessees must agree to allow the lessor and his agents from time to time to enter upon and into all parts of the leased premises for purposes of inspection, and agree to keep a full and correct account of all their operations and make report thereof, under oath, promptly after the end of each month, to the lessor, and to the Secretary of the Interior, through such officer as he may designate, and their books shall be open at all times to the examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior to make such examination.

"The agent, before transmitting a lease, will ascertain whether the lessor or lessors are in fact the parties to whom the land was allotted.

12 "Sec. 7. No person or corporation will be allowed to lease, within the territory occupied by the Creek and Cherokee Nations, for the purpose of mining for oil and gas, more than 4,800 acres of land in the aggregate.

"Any oil or gas lease presented to the Department must be accompanied by an application by the lessee, for the approval of such lease or leases, in the form of an affidavit, showing that the lessee is not directly or indirectly interested in any oil and gas leases or applications for such leases, within the territory occupied by such nations, the lands embraced in which, with the tracts covered by the lease or leases presented for approval, would make more than 4,800 acres.

"Applications to have leases approved mudt follow the form on page 37."

"Deeds and leases.

"Sec. 8. No lease or deed will be approved that is executed prior to the approval and delivery of the deed to the allottee. Annexed to these regulations are forms of petition, deed, certificate of officer taking acknowledgement, affidavit of witnesses, grantor's affidavit, grantee's affidavit, certificate of officer who appraised the land, lease, bond and affidavit of surety, which forms must be followed in all cases. All deeds and leases will be transmitted by the Indian Agent or other proper officer in charge, through the proper channels, for the Secretary's approval.

Sec. 9. The post-office address of each party in interest must be given in the instrument which is sought to have approved, and the post-office address of each subscribing witness must appear on the papers.

Sec. 10. A lease or conveyance of undivided inherited lands, or of undivided allotments made directly to the heirs of a deceased citizen will be approved only in cases where all the heirs join in the lease, deed or instrument of conveyance.

Sec. 11. If inherited lands, or lands allotted directly to heirs of a deceased citizen, have been patitioned, evidence thereof must accompany a deed or instrument of conveyance of such lands.

Sec. 12. In cases where the lands embraced in a lease, deed, or instrument of conveyance were inherited from one who died after the allotment was made to him, such lease, deed or instrument of conveyance must be accompanied by a certificate signed by two officials of the town or band of which such allottee was a member, or by two or more reliable members of the tribe, setting forth that the allottee to whom the land was originally allotted is dead, giving as nearly as possible the date of death. Such certificate shall also show the names and ages of the heirs, adults and minors of such deceased allottee, but the department reserves the right to require, if in its judgment it shall be considered necessary such further and additional evidence relative to the heirship as may be deemed proper. If the persons who certified to the death of the allottee are, from their own knowledge, unable to certify as to who are the heirs (with their names and ages) of such deceased allottee, an additional certificate made by persons of one of the two classes herein specified, showing who are the heirs and giving their names and ages (adults and minors), must be furnished. And one of the certificates above mentioned, or an additional certificate made as above specified, must set forth definitely whether or not any children were born to such deceased allottee dis-
13 posed of his homestead or any portion of his allotment by will."

"Sec. 13. In cases where the lands embraced in a lease, deed, or instrument of conveyance were allotted directly to the heirs of a citizen who died before receiving an allotment, such lease, deed, or instrument of conveyance must be accompanied by a certificate signed by two officials of the town of band of which such citizen was a member, or by two or more reliable members of the tribe, setting forth the names and ages of the heirs, adults and minors, of such deceased citizen, the Department reserving the right to require additional evidence as provided in section 11 hereof.

"Sec. 14. If there shall have been or shall hereafter be probate or other court proceedings, establishing who are the heirs of such deceased allottee or such deceased citizen, a certified copy of the final order, judgment, or decree of the court showing and determining such heirship must be furnished; but where such court proceedings have not been had a compliance with the requirements of the provisions of section eleven and twelve hereof, as the case may be, will be deemed sufficient to establish the heirship.

"Sec. 15. In cases of transfers, leases, and sales to which minors are parties grantor, the transfer, lease, or sale must be made by a guardian, and the lease, deed, or instrument of conveyance must be accompanied by certified copies of the orders of the proper court appointing the
[authoring] him to make such transfer, lease, or sale, and it must be fully understood that the Department reserves the right to use any means at its disposal for the purpose of ascertaining whether the consideration given is the fair value of the land, and whether the proposed lease or sale is for the best interest of the Indian.

"Sec. 1. Leases for minerals, other than coal, asphalt, oil and gas must be made on the form attached hereto, page 46. "Hereafter no rents, royalties, or payments accruing under any lease which has been approved by the secretary of the Interior, or which requires his approval, shall be paid direct to the lessor, or to the guardian or curator of a minor or incompetent, by all payments to be made under any lease shall, at the times and in the amounts specified in such instrument, be deposited with the United States Indian Agent at Union Agency, or with such other person as may be designated by the secretary of the Interior to receive the same, to be turned over to the lessor or his representatives, except that rents, royalties, or payments accruing under any lease made for or on behald of any minor or incompetent shall be deposited, by the officer to whom the same is paid, to the credit of the guardian or curator of such minor or incompetent in some national bank or banks, to be designated by the Commissioner or in-

dian Affairs, and such bank or banks shall give bond, in such sum as the Commissioner of Indian Affairs may require, guaranteeing the safe care and custody of the funds so deposited, such bond to be approved by the secretary of the Interior, and said funds shall not be withdrawn by such guardian or curator, except upon the order of the United States Court for the judicial district in which the leased premises are situate. Guardians must state, under oath, whether any bonus has been paid to procure the lease, and the amount of bonus, if any, paid or to be paid, directly or indirectly, to them. This statement must be filed at the time of the lease is presented to the Indian Agent.

"All leases which require the approval of the secretary of the Interior must be submitted to the Indian Agent, Union Agency, for transmittal within 30 days from and after
14 the date of the approval of this amendment. No such lease presented after the time herein designated will be received by the agent or transmitted to the Department, or regarded as having any effect whatever.

"Amendments of March 20 1905.

"Lessees whose leases and bonds have heretofore been approved by the Secretary of the Interior shall be required to drill at least one well on the premises covered by each lease within twelve months from the date of the approval hereof. Lessees whose leases have heretofore been approved, but bonds covering which have not yet been approved, shall be required to drill at least one well on the land covered by each lease within twelve months from the date of the approval of the bond. All lessees in whose favor leases are hereafter approved shall be required to drill at least one well on the premises covered by each lease within twelve months from the date of the approval of the bond, and should any lessee fail, neglect, or refuse to drill at least one well on the land covered by each lease within the time herein stated, the lease may, in the discretion of the Secretary of the Interior, be declared null and void, with due notice to the lessee and proof of the default.

"On each gas-producing well where the gas is utilized lessees shall be required to pay, at the end of each year, a royalty of $150.00. Failure on the part of the lessee to use a gas producing well where the same cannot be reasonably utilized at the prescribed rate shall not work a forfeiture of the lease for oil purposes, but if the lessee desires to retain gas producing privileges, he or they shall pay a royalty of $50.00 per annum on each gas producing well not utilized, the first payment to become due and to be made within 30 days from the date of the discovery of gas, but upon gas wells heretofore

drilled, the gas from which is not being utilized, the first payment shall become due and be made within 30 days from the date of the approval hereof. Subsequent payments for such wells shall be made in advance at the first of each succeeding year, dating from the first payment.

"Lessees who have leases now pending in the Union Agency and those who may hereafter submit leases shall each be required to make a satisfactory showing to the Department that said lessees have taken said leases in good faith for the purpose of mining oil, and not for speculation and re-sale, and that they have the business capacity and financial ability to perform all the requirements specified in said leases.

"With the consent of the United States Indian Agent lessees may make arrangements with the purchasers of oil for the payment of the royalty to the United States Indian Agent by such purchasers, but such arrangement, if made, shall not operate to relieve lessees from the responsibility from the payment of the royalty, should such purchasers fail, neglect, or refuse to pay the same when it becomes due.

"Amendment of April 22 1905.

"Hereafter the papers accompanying leases made with a corporation and a guardian shall be:

(1) Sworn application upon form provided by Department.

(2) Statement from Commission to the Five Civilized Tribes verifying allotment.

(3) Affidavit of some representative of oil company showing no operations and payment of bonus.

(4) Certified copy of articles of incorporation.

(5) If a foreign corporation, certificate of clerk of Indian Territory Court of Appeals showing compliance with Indian Territory corporation law.

(6) Evidence in the form of a single affidavit of the secretary of the company, or by the president, showing authority for the officers to execute the lease, bond, and other papers.

(7) Financial statement made by an officer of the company showing the amount of the capital stock issued and actually paid in and money available for mining operations; that the lease is taken in good faith and and not for speculation and resale. Also statement showing $5000.00 set aside for developing the particular lease and where the same is deposited, together with certificate from such depository of the fact of such deposit, but not as to the intention of the depositor..

(8) Certified copy of appointment of guardian.

(9) Certified copy of order of court authorizing guardian to enter into lease, and confirmatory order.

(10) Affidavit of guardian showing his relationship to, age of the minor, and whether any bonus paid, and the amount thereof, if any paid or to be paid directly or indirectly to said guardian.

"No plat will be required with oil and gas leases, but with leases covering other minerals there shall be furnished a map or a sufficiently large scale to show the part or parts of the allotment which are supposed to be underlaid by such minerals.

"Where the lessee is an individual the following paper will suffice:

(1) Sworn application upon the form provided by the Department.

(2) Statement from the Commission to the Five Civilized Tribes verifying allotment.

(3) Affidavit of lessee or his representatives showing no operations and the payment of bonus.

(4) Financial statement, with necessary statement from bank and other evidence required to accompany same.

"But where the lessor is a minor the following additional papers should be furnished.

(5) Certified copy of appointment of guardian.

(6) Certified copy of order of Court authorizing guardian to enter into lease, and the confirmatory order.

(7) Affidavit of guardian showing his relationship to, and age of minor, and whether any bonus paid, and the amount thereof, if any paid or to be paid, directly or indirectly, to said guardian.

"Amendment of May 23 1905.

"Every lessee shall securely cap or plug each oil or gas well upon the land leased within three days after the same is abandoned or not used, and every lessee failing to securely cap or plug his oil or gas well, as above required, shall pay the United States Indian agent for the Union Agency, for the use of the lessor, the sum of $10 per day for each well during the time said well or wells remain not capped or plugged, and for any failure on the part of the lessee to comply with any rule or regulation or any obligation in his lease, the Secretary of the Interior may revoke his approval of any such lease, after due

notice to the lessee. This regulation shall be applicable to leases heretofore made as well as those hereafter entered into.

"Amendment of June 8, 1905.

"In order that the Department may have definite information before it concerning the lessees in oil and gas leases covering lands in the Cherokee and Creek Nations, it is required that corporation lessees furnish affidavits covering the following points:

"(1) State the total number of shares of capital stock actually issued and specifically the amount of cash paid into the [the] treasury on each share sold, or if paid in property, state kind, quantity, and value of the same paid per share. (2) Of the stock sold, how much per share remains unpaid and subject to assessment? (3) How much cash has the company in its treasury and elsewhere, and from what sources was it received? Certificates by officers of the banks should be furnished showing the amount deposited therein to the credit and subject to the check of the company. (4) What property exclusive of cash, is owned by the company, and its value? (5) What is the total indebtedness of the company? and specifically the nature of its obligations? (6) State what experience the officers of the company or others connected with it or employed by it have had in the production of petroleum and gas, or in any other business.

16 "Affidavits should also be furnished by individual lessees showing the financial responsibility, the amount of cash on hand available for mining operations, and their experience in the oil and gas business or other business. They should also submit affidavits by bank officers showing the amount deposited to their credit.

"The required information shall be furnished within fifteen days from the date of the letter of the Indian Agent at Union Agency requesting it.

"These amendments shall be applicable to all leases heretofore approved, as well as to those that may hereafter be approved.

"Amendment of December 27, 1905."

"Lessees shall not be allowed to drill oil or gas wells within one hundred and fifty feet of the division line beween the lands covered by their leases and adjoining lands, whether the latter lands are leased or unleased, allotted or unallotted.

"F. E. LEUPP, Commissioner.

"Department of the Interior,
"Washington, D. C.
"Approved December 27, 1906.
E. A. Hitchcock,
"Secretary."

6. Your orator further shows that under and by virtue of said lease he is the owner of and has the exclusive right to all oil deposits and natural gas in or under said last above described land, with the further right to enter on said land, and to prospect for, extract, pipe, store, refine, and remove such oil and natural gas and to occupy and use so much of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining, and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise sufficient supply of water to carry on such operations, and including still further the right to use such oil and natural gas for fuel so far as is necessary in the prosecution of said operations.

7. Your orator further shows that the defendants and each of them claim and assert some right, title and interest in and to said lands and particularly to the said oil and natural gas deposits adverse to your orator, but the nature of said claims of said defendants is to your orator unknown; but your
17 orator states that they have no such right, title or interest in the said deposits of oil and natural gas or any part thereof; that whatever claimed rights the said defendants or any of them have therein, were acquired long subsequent to the right of your orator hereinbefore set forth; and further were acquired with notice and knowledge of the lease to your orator so executed, filed and approved as aforesaid; and also of facts and circumstances sufficient to put them and each of them upon inquiry with reference thereto.

8. Your orator further states that the said defendant Kiefer Oil and Gas Company, combining and confederating with the other defendants named herein, have disregarded and still disregard the rights of your orator, and in violation thereof, and without right, unlawfully and wilfully on or about the first day of April, 1907, enter upon the said above described lands, and have stationed thereon divers agents, servants and employes, whose names are to your orator unknown, and with force and arms exclude and have excluded your orator, and his agents, servants and employes therefrom; and further that said defendants have bored and drilled oil and gas wells on said premises, and have and still are allowing large quantities of oil and natural gas to escape therefrom and be wasted.

That by reason thereof your orator has been damaged in the sum of $25000.00. And further, said defendants threaten to, and will unless restrained by this court, drill other and further wells on said land for oil and natural gas, and have and are threatening to and will unless restrained, by means of such wells, extract said oil and gas deposits from said land and convert the same to their own use and benefit against the manifest right of your orator.

9. That your orator believes and charges the fact to be that said lands has no value except for its deposits of oil and natural gas, and that it contains large and valuable deposits of oil and natural gas to the value of $1000,000.00. That your orator under his said lease aforesaid has the sole and
18 exclusive right to mine said oil and natural gas; and that said lease is of the value of $75,000.00; and that the matter in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000.00.

That your orator is and will be without means of knowing the amount of such oil and natural gas which the defendants or one or more of them might thus extract from said lands and waste and convert to their own use, and benefit, and has and will have no means or source of information to trace, identify and discover the amount of property which might thus be wrongfully and unlawfully wasted and converted.

That the lands surrounding and adjacent to the lands last above described are now being explored and drilled for oil and natural gas, and that the work in that behalf will continue rapidly. That several wells, the exact number of which is to your orator unknown have been drilled on the lands immediately adjoining the lands last above described, and about 150 feet distant from the line of said above described land.

That by means of the location of said wells adjacent or in close proximity to the said above described lands, the deposits of oil and natural gas in and under said described lands are being extracted and drained off and will be extracted and drained off through said wells, to the great, permanent and irreparable loss and damage of your orator.

That the only relief against such loss and the only means hereby your orator may secure to himself the benefits of his said oil and gas mining lease is to without delay bore and drill wells on said above described land, and extract the oil and natural gas therefrom before it shall have been lost to him in the manner hereinbefore set forth. That to accomplish this it is necessary that such work of exploration and development and the drilling and boring such wells shall be begun and prosecuted with all reasonable speed and dispatch.

19 10. Your orator further shows that under and by virtue of the terms of said lease it was, among other things, covenanted and agreed as follows:

"The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to drill at least one well thereon within twelve months from the date of the approval of the bond by the Secretary of the Interior, and should the parties of the second part fail, neglect, or refuse to drill at least one well within the time stated, this lease may, in the discretion of the Secretary, be declared null and void, with due notice to the lessee and proof of the default," and further

"And the said party of the second part expressly agrees that should he or his sublessees, heirs, executors, administrators, successors or assigns, violate any of the covenants, stipulations or provisions of this lease, or fail for the period of sixty days to pay the stipulated monthly royalty provided for herein, then the parties of the first part shall be at liberty in their discretion, to avoid this indenture of lease and cause the same to be annulled when all the rights, franchises, and privileges of the party of the second part, his sublessees, heirs, executors, administrators, successors or assigns, hereunder shall cease and end without proceedings."

That by reason of the premises and for the due protection of said lease hold it is necessary that your orator, either himself or his agents, should with all reasonable dispatch and diligence sink, bore and drill oil and gas upon the said land; but this your orator is prevented from doing by the wrongful conduct and forcible possession taken and held of the said premises by the defendants as hereinbefore set forth.

11. That the defendant, Kiefer Oil and Gas Company, which is in unlawful and forcible possession of said land, is insolvent; and said company has no assets other than its claim to the deposits of oil and natural gas in and under said above described lands; that all the defendants named herein are unable to respond in damages in any recovery at law which your orator might obtain against them or one or more of them. That your orator will suffer permanent and irreparable injury unless an injunction is granted restraining the said defendant Kiefer Oil & Gas Company, its successors and assigns, and the other defendants herein from prospecting for oil and natural
20 gas upon the lands above described, or from extracting any oil and gas therefrom, and from asserting any interest in or to said premises adverse and hostile to the interest of

your orator; and from in anywise interfering with the rights of your orator acquired under and by virtue of his oil and gas mining lease hereinbefore mentioned and set forth.

In consideration whereof, and inasmuch as your orator can have no adequate remedy at law, and to the end, therefore, that the defendants herein may, if they can, show why your orator should not have the relief herein prayed, and may make a full disclosure and discovery of all the matters aforesaid, and, according to the best and utmost of their remembrance, knowledge, information and belief, full, true, direct and perfect answer make to the matters and things hereinbefore stated and charged your orator prays:

1. That the defendants and each of them may be required to set forth under oath their right, title and interest, if any they have, in or to said premises, and particularly in and to said deposits of oil and natural gas.

2. That your orator be allowed of defendants, judgment in the sum of $25,000.00 as damages aforesaid. That an accounting [amy] be had between the parties hereto; and that it may be determined what moneys, if any, are due the defendants or any of them.

3. That your orator may be adjudged to have by virtue of the lease hereinbefore set forth the sole and exclusive right, as lessee, to all and singular the oil and natural gas deposits in and under the tract of land hereinbefore described, with the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas and to occupy and use so much of the surface of land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or otherwise a sufficient supply of water to carry on said operations, and including still further, the right
21 to use such oil and natural gas for fuel so far as it is necessary to the prosecution of such operations and generally to have all things secured to him under and by virtue of said lease.

4. That the said defendants, and each of them, may be adjudged to have no interest, estate, or property in or to the said oil and gas deposits or any part thereof, save only in so far as any of said defendants may have an interest in said real estate and entitled to the royalty secured by the said lease hereinbefore mentioned; and that the cloud cast upon the title of your orator by any and all claims of title or interest or estate made by said defendant, or any one or more of them, may be removed and the title of your orator forever quieted thereto.

5. That the said defendant, and each of them be enjoined and restrained from prospecting upon or drilling the said lands for oil and natural gas, or otherwise, or from extracting any oil and gas therefrom; and may be enjoined and restrained by this court from asserting any interest in or to said premises and particularly the said oil and gas deposits, adverse and hostile to the interest and title of your orator therein, and be enjoined and restrained from in anywise interfering with the rights of your orator acquired under and by virtue of the lease hereinbefore set forth; and that upon final hearing said injunction be made perpetual.

6. That to the end of securing to your orator adequate relief in the premises a receiver may be now appointed of all and singular the said real estate, lands and tenements, and of the said oil and natural gas deposit, with authority to enter upon, seize and take possession of all and singular the same and every part thereof, and under the order and direction of this court, and for the due preservation and protection of your orators' said lease to prospect for oil and natural gas upon the said lands hereinbefore described, and to sink, drill and bore oil and natural gas wells, and to take and extract from said lands
22 the oil and natural gas in and under the same; and generally, to do all things necessary or convenient to the due discharge and protection of the rights and interests granted to your orator under and by virtue of said lease; and to manage, control and hold said property and all proceeds therefrom under the order and direction of this court and subject to the further order of the court herein, and that your orator be finally decreed to be entitled to all the benefits and proceeds thereof.

7. That the court grant to your orator your writ of subpoena directed to the Kiefer Oil and Gas Company, D. A. MacDougal, Perry McKay and Edmond McKay and to such others as shall in the discretion of the court appear necessary to the hearing and final determination of this cause, commanding them on a day certain to appear and answer under this bill of complainant but [bot] under oath; and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience; and that your orator have such other and further relief to which in equity and good conscience, he may be entitled.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant.

23 State of Kansas,
County of Montgomery—ss.

A. W. Shulthis, Being first duly sworn, upon oath deposes and says: That he is the complainant in the above entitled

action; that he has read the foregoing complaint in equity and that the things and statements therein contained are true.

ALBERT W. SHULTHIS.

Subscribed and sworn to before me on the 24th day of December A. D. 1907.

(Seal)

ERNEST SEWELL.

24 "Exhibit 1." 8838

Transferable Only With Consent Of The Secretary Of The Interior.

Oil And Gas Mining Lease.

Upon Land Selected for Allotment, Creek Nation, Indian Territory.

(Section 17, Act of June 30, 1902, 32 Stat. 500).

This Indenture Of Lease, Made and entered into, in quadruplicate, on this 24th day of March, A. D. 1906, by and between George Franklin Berryhill and Clementine Berryhill, father and mother, and sole and only heirs at law of Andrew J. Berryhill, deceased, of Sapulpa, Indian Territory, parties of the first part, and Albert W. Shulthis of Independence, Kansas, party of the second part, under and in pursuance of the provisions of section 17 of the act of Congress approved June 30, 1902, and the regulations prescribed by the Secretary of the Interior thereunder.

Witnesseth: That the parties of the first part, for and in consideration of the royalties, covenants, stipulations and conditions hereinafter contained, and hereby agreed to be paid, observed, and performed by the party of the second part, his successors and assigns, do hereby demise, grant, and let unto the party of the second part, his successors and assigns for the term of fifteen years from the date hereof, all of the oil deposits and natural gas in or under the following-described tract of land, lying and being within the Creek Nation and within the Indian Territory, to-wit: Lot Five (5) of Section Six (6), The North East Quarter of the North West Quarter of Section Eighteen (18) Township Seventeen North, Range twelve East, of the Indian Meridian, and containing Eighty and 12/100 (80.12) acres, more or less, with the right to prospect for, extract, pipe, store, refine, and remove such oil and natural gas, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining, and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of

pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel so far as it is necessary to the prosecution of said operations.

In consideration of which the party of the second part hereby agrees and binds himself his successors and assigns, to pay or cause to be paid to the lessors as royalty the sum of ten per cent of the value, on the leased premises, of all crude oil extracted from the said land, and if the parties do not, before the tenth day of the month succeeding its extraction, agree upon the value of the crude oil on the leased premises, the vaule thereof shall finally be determined under the direction of the Secretary of the Interior in such manner as he shall prescribe, and to so pay the royalty accruing for any month on or before the twenty-fifth day of the month succeeding, and where the value of the crude oil fluctuates, the average value during the month shall constitute the criterion in computing the royalty; and to pay in yearly payments, at the end of each year, one hundred and fifty dollars royalty on each gas-producing well, the lessors to have free the use of gas for lighting and warming their residence on the premises.

..... But failure on the part of
: (Stamped here as follows) : the lessee to use a gas-produc
: Received April 21 1906 : ing well where the same can
: Office of U. S. Indian Agent : not be reasonably utilized at
: Muskogee, Ind. Ter. : the rate so prescribed, shall
..... not work a forfeiture of this lease so faar as the same relates to mining oil, but if the lessee desires to retain gas producing privileges he shall pay a royalty of fifty dollars per annum on each gas-producing well not utilized, the first payment to become due and to be made within thirty days from the date of the discovery of gas, payments thereafter for such wells to be made in advance at the first of each succeeding year, dating from first payment.

And the party of the second part further agrees and binds himself, his successors and assigns, to pay or cause to be paid to the lessors, as advanced annual royalty on this lease, the sum of money as follows, to-wit: Fifteen cents per acre per annum, in advance, for the first and second years, Thirty cents per acre per annum, in advance, for the third and fourth years; and Seventy-five cents per acre per annum, in advance for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty, and further, that should the party of the second part neglect or refuse to pay such ad-

vanced royalty for the period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessors, be null and void, and all royalties paid in advance shall become the money and property of the lessors.

The party of the second part further covenants and agrees to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to drill at least one well thereon within twelve months from the date of the approval of the bond by the Secretary of the Interior, and should the party of the second part fail, neglect, or refuse to drill at least one well within the time stated, this lease may, in the discretion of the Secretary, be declared null and void, with due notice to the lessee and proof of the default; and said party of the second part agrees to operate the same, in a workmanlike manner to the fullest possible extent, unavoidable casualties excepted; to commit no waste upon the said land and to suffer no waste to be committed upon the portion in his occupancy or use; to take good care of the same, and to promptly surrender and return the premises upon the termination of this lease to the parties of the first part or to whomsoever shall be lawfully entitled thereto, and not to remove therefrom any buildings or improvements erected thereon during the said term by the said party of the second part, but said buildings and improvements shall remain a part of said land and become the property
27 of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, excepting that tools, boilers, boiler-houses, pipe lines, pumping and drilling outfits, tanks, engines and machinery and the casing of all dry or exhausted wells, shall remain the property of the said party of the second part, and may be removed at any time before the expiration of sixty days from the termination of the lease; that he will not permit any nuisance to be maintained on the premises under his control, nor allow any intoxicating liquors to be sold or given away for any purpose on such premises; that he will not use such premises for any other purpose than that authorized in this lease, and that before abandoning any well he will securely plug the same so as to effectually shut off all water above the oil-bearing horizon.

And it is mutually understood and agreed that no sublease, assignment, or transfer of this lease or of any interest therein or thereunder can be directly or indirectly made without the written consent thereto of the lessors and the Secretary of the Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void.

And the said part of the second part further covenants and agrees that he will keep an accurate account of all oil mining operations, showing the whole amount of oil mined or removed;

and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all of the oil obtained from the land herein leased, as security for the payment of said royalties.

And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Creek Nation.

And the said party of the second part expressly agrees that should he or his sublessees, heirs, executors, administra-
28 tors, successors or assigns, violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of sixty days to pay the stipulated monthly royalty provided for herein, then the parties of the first part shall be at liberty, in their discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the party of the second part, his heirs, sublessees, executors, administrators, successors or assigns hereunder shall cease and end without further proceedings.

If the lessee makes reasonable and bona fide effort to find and produce oil in paying quantity as is required herein of him, and such effort is unsuccessful, he may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all his then existing obligations hereunder; Provided, however, That approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that this lease shall be of no force or effect unless the party of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the regulations of July 10, 1903, prescribed by the Secretary of the Interior, which shall be deposited and remain on file in the Indian Office during the life of said lease.

In Witness Whereof, The said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

Father and Mother	his mark	
and sole heirs at	GEO. F. x BERRYHILL	(Seal)
Law of Andrew J.	ALBERT W. SHULTHIS	(Seal)
Berryhill, deceased.	CLEMENTINE BERRYHILL	(Seal)

29 Attest:

.....

Two witnesses to execution by lessor:
C. B. McElwaine,
P. O. Sapulpa, I. T.
John Chaney,
P. O. Sapulpa, I. T.

Two witnesses to execution by lessee:
Anna Truttman,
P. O. Independence, Kansas.
Elmer E. Page,
P. O. Independence, Kans.

Acknowledgment.

United States of America, Indian Territory,
Western Judicial District—ss.

On this 24th day of March, A. D. 1906, before me, United States Commissioner, within and for the Western Judicial District of the Indian Territory, appeared in person Geo. Franklin Berryhill & Clementine Berryhill, to me personally well known to be the persons whose names appear upon the within and foregoing Oil and Gas Mining Lease, as the party lessors, and stated that they had executed the same for the consideration and purposes therein mentioned and set forth, and I hereby so certify.

In Testimony Whereof, I have hereunto set my hand and affixed my seal as such, in the Western District of the Indian Territory, on this 24th day of March, A. D. 1906.

C. V. BUTTERWORTH,
United States Commissioner.

30 Proof of Lease by Subscribing Witnesses.

United States of America, Indian Territory,
Western Judicial District—ss.

: No. 832. (Stamped) : Received : Apr. 29, 1907. : Office of U. S. Indian Agent : Muskogee, Ind. Ter. :

On this 24th day of March, A. D. 1906, before me United States Commissioner, within and for the Western District of the Indian Territory, personally appears C. B. McElwaine of Sapulpa, Indian Territory, and John Chaney of Sapulpa, Indian Territory, who being first duly sworn according to law, stated each for himself that he saw Geo. F.

Berryhill & Clementine Berryhill lessor in the foregoing Oil and Gas Mining Lease subscribe and execute the said Mining Lease, on the day of its date; that the said Mining Lease was read over and explained in their presence to the said lessor, who stated that they understood and approved the same and acknowledged that they had subscribed and executed said Mining Lease for the uses, purposes and considerations therein expressed; and that they had signed the same as subscribing witnesses at the request of said lessors.

C. B. McELWAINE.
JOHN CHANEY.

Subscribed and sworn to before me on this 24th day of March, A. D. 1906.

And I do hereby further certify that I am acquainted with the said C. B. McElwaine and John Chaney, the subscribing witnesses to the above and foregoing Mining Lease and that said witnesses are reputable persons and entitled to full faith and credit.

C. W. BUTTERWORTH.
United States Commissioner.

31 Indorsed:
16238 Indian Office 8838.
23-374 Apr 15 1907
36492 Quadruplicate
Compared

Department of the Interior, Washington, D. C.
Oil and Gas Mining Lease, Creek Nation, I. T. Indexed

George F. Berryhill and Clementine Berryhill, Sapulpa, Indian Territory, To Albert W. Shulthis, of Independence, Kansas. Of Lot Five (5) of Sec. Six (6), The North East Quarter of the North West Quarter of Section Eighteen (18) Sec. ....., Tp. 17, Range 12, in the Creek Nation, Indian Territory. Dated March 24, 1906. Expires March 23, 1921.

Indian Territory, Western District, At Sapulpa, Ind. Ter. I hereby certify that this instrument was filed for record in my office on May 18, 1907, at 3:30 o'clock P. M., and is duly recorded in Record 17, page 547.

O. M. IRELAN,
Deputy Clerk & ex-officio Recorder.

Department of the Interior, U. S. Indian Service, Union Agency,

Muskogee, I. T., Apr. 8-1907.

The within lease is forwarded to the Commissioner of In-

dian Affairs with recommendation that it be Approved. See my report of even date.

DANA H. KELSEY,
U. S. Indian Agent.

Department of the Interior, Office of Indian Affairs. GWW

Washington, D. C., Apr. 18, 1907.

Respectfully submitted to the Secretary of the Interior, with recommendation that it be Approved.

C. F. LARRABEE,
Acting Commissioner.

Department of the Interior,

Washington, D. C., Apl. 19, 1907.

Approved.

JESSE E. WILSON,
Assistant Secretary of the Interior.

Quadruplicate

32 Bill of Complaint Indorsed as follows: Albert W. Shulthis, Plaintiff, vs. D. A. McDougal, Edmond McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendant. Bill in Equity. Filed Dec. 28, 07. L. G. Disney, Clerk. L. S. Willour, Dep. Thomas & DeMeules, Suite 7, Masonic Bldg., Muskogee, Ind. Ter., For Complainant.

33 And afterwards, to-wit, on the 13th day of January, 1908, the defendants, D. A. McDougal, Edmund McKay, Perry McKay and Kiefer Oil and Gas Company, appeared herein and filed their joint and several answer herein, which answer is in words and figures as follows:

34 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. MacDougal, Edmund McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendants.

The Joint and Several Answer of the Defendants to the Complainant's Bill against Them in the Above Styled Cause.

All of these defendants, now and at all times saving and reserving unto themselves all benefits and advantage of exception to the many errors, uncertainties, imperfections and insufficiencies in the complainant's bill of complaint contained, for answer thereto, or to so much of such parts thereof as

these defendants are advised it is material and necessary for them to make answer to, answering, say that:

I.

They admit the complainant's residence and citizenship and the residence and citizenship of the defendants;
35 they admit that the defendant, Kiefer Oil and Gas Company, is a corporation, organized under the laws of the United States in force in the Indian Territory, with its principal place of business in the said Territory before it became a part of the State of Oklahoma, and they admit that said defendant corporation, since the admission of the State of Oklahoma into the Union, has been and is now a domestic corporation of the State of Oklahoma, with its principal place of business in the Eastern District of the said state.

II.

They admit that in the month of May, A. D. 1901, there was born to one George Franklin Berryhill and Clementine Berryhill; husband and wife, a son who was named Andrew J. Berryhill; that said George Franklin Berryhill is, and at all times mentioned in the complaint was, a Creek Indian and a citizen of the Creek Nation, duly enrolled as such by the Commission to the Five Civilized Tribes as a citizen by blood; that said Clementine Berryhill, wife and mother, is not and at no time has been a citizen of the Creek Nation; that said Andrew J. Berryhill departed this life in the month of November, 1901, intestate and unmarried, leaving no brothers nor sisters surviving him; that thereafter, and on or about the eighth day of October, A. D., 1902, the name of said Andrew J. Berryhill was duly placed upon the approved rolls of the Creek Nation as a citizen thereof by the Commission to the Five Civilized Tribes, and his enrollment as such citizen was approved by the Secretary of the Interior on November 14, 1902. Defendants deny that there was thereafter allotted, by the Commission to the Five Civilized Tribes, to the heirs of said
36 Andrew J. Berryhill, deceased, the lands described in the bill, or any lands, and, in this connection, aver and plead, that on the.....day of.....,in the year 1904, the Commission to the Five Civilized Tribes, set apart and allotted to said Andrew J. Berryhill, deceased, the lands described in the complainant's bill, to-wit:

The northeast ¼ of Northwest ¼ of Section 18, and the East ½ of Northwest ¼ of Northeast ¼, and Southwest ¼ of Northwest ¼ of Northeast ¼ of Section 13, Township 17 North, Range 12 East, and Lot One of Section 2, Township 16 North, Range 15 East, containing 120.15 acres more or less.

Defendants admit that on or about October 10, 1905, the United States of America, together with the Creek Nation, did, through their legal representatives, execute a deed or patent to said lands, but defendants deny that the said lands, or any part thereof, were or was sold and conveyed by the United States and the Creek Nation unto the heirs of said Andrew J. Berryhill, deceased, but aver and plead in this connection, in their behalf that the Principal Chief of the Creek Nation, P. Porter, on behalf of the Creek Nation, did on or about October 10, 1905, execute a deed or patent covering and describing said lands, which was subsequently approved by the Secretary of the Interior in behalf of the United States of America, confirming the title in and to said lands in the heirs of said Andrew J. Berryhill, deceased, which said patent was afterwards, and in the year 1905, filed with the Commission to the Five Civilized Tribes, and recorded in the records in the office of the Commission to the Five Civilized Tribes as re-
37 quired by law. In this connection, and in their behalf, these defendants aver and plead that said Andrew J. Berryhill deceased, was born on the sixth day of May, 1901, and died on the .... day of November, 1901. Defendants also in this connection aver and plead that said George Franklin Berryhill, the father of said Andrew J. Berryhill, deceased, is not a full-blood Indian citizen of the Creek Nation, and that the rolls of citizenship made up by the Commission to the Five Civilized Tribes show that said George Franklin Berryhill is a mixed-blood citizen of the Creek Nation, and not a full-blood Indian citizen.

III.

Defendants deny that on or about the 24th day of March, 1906, or at any other time, the said George Franklin Berryhill and Clementine Berryhill were the owners in fee of the lands described in the complainant's bill or any part thereof, and they deny that said George Franklin Berryhill and Clementine Berryhill or either of them, were or was the owner in fee on March 24, 1906, or at any other time, of that part of the land described in complainant's bill as follows:

The Northeast Quarter of the Northwest Quarter of Section Eighteen, Township Seventeen North, Range Twelve East of the Indian Base and Meridian, being and lying in the Creek Nation of the Indian Territory.

Defendants admit that on or about March 24, 1906, the said George Franklin Berryhill and Clementine Berryhill did make, execute and acknowledge and deliver unto the complainant, a certain lease in quadruplicate, whereby they did de-
38 mise, grant and let unto the complainant, his executors, administrators and assigns, for the term of fifteen years from the date thereof, the said

Northeast Quarter of the Northwest Quarter of Section Eighteen, Township Seventeen North, Range Twelve East of the Indian Base and Meridian,

being part of the land described in the bill, together with other lands therein described, by the terms of which lease said George Franklin Berryhill and Clementine Berryhill undertook to confer upon the complainant the right to prospect for, pipe, store, refine and remove oil and natural gas from said lands and occupy the surface thereof for that purpose, a copy of which lease is set out correctly as Exhibit No. 1 to complainant's bill, and for its terms and conditions reference is made to the lease as shown by said Exhibit No. 1 to complainant's bill.

These defendants do not know, and have not been informed, save by said bill of complaint, whether or not a valuable consideration to said George Franklin Berryhill and Clementine Berryhill was in hand paid at or about the time said lease was executed by them to the complainant, and they therefore leave the complainant to produce evidence thereof and they require and demand of the complainant strict proof of this allegation in his bill.

These defendants positively deny that the said lease, as shown by Exhibit No. 1 to the said bill, was, on April 19, 1907, or at any other date or time, approved by the Secretary of the Interior.

These defendants do not know, and have not been informed, save by said bill of complaint, whether complainant
39 filed a bond to accompany said lease in all respects in accordance with the regulations of the said Secretary of the Interior, and do not know, and have not been informed, save by said bill of complaint, whether said bond was on April 18, 1907, or at any time, approved by the Secretary of the Interior, and they therefore leave the complainant to make such proof thereof and demand and require of complainant strict proof of this allegation in the bill. Defendants deny that complainant filed any bond as required by the rules and regulations of the Secretary of the Interior and by the terms of the said lease before June 5, 1906, and aver and plead in this connection that any bond filed by the complainant was filed after June 5, 1906.

IV.

Defendants admit that one of the quadruplicate parts of said lease, as shown by Exhibit No. 1 to the bill, was on May 18, 1907, filed for record in the office of Clerk of the United States Court as Ex-Officio Recorder for the then existing West-

ern Judicial District of the Indian Territory, at Sapulpa, and was duly recorded in the records of the said office.

V.

Defendants do not know, and have not been informed, save save by said bill of complaint, whether complainant did on or about the.....day of May, 1907, in acordance with the regulations of the Secretary of the Interior, pay into the hands of the United States Indian Agent the advance royalty provided for in said lease, and therefore leave the complainant to make such proof thereof as he may be advised in ma-
40 terial and as he may be able to make, defendants requiring strict proof of this allegation.

VI.

Defendants deny that the complainant, by virtue of said lease, is the owner of and has the right or exclusive right to the oil and natural gas deposits in and under said land in controversy, and defendants deny that the complainant has the right to enter on the said land and prospect for and extract therefrom oil and gas and to remove same from the premises, and defendants deny that the complainant has the right to occupy and use so much of the surface of the said land in controversy for the purpose of exploring for oil and gas and extracting, piping, storing, refining and removing oil and natural gas from said land, and defendants deny that the complainant has any mineral rights in said land or any right to occupy and possess the same for mineral purposes.

VII.

Defendants, and each of them, admit that they claim and assert right and title in and to the lands in controversy, and they admit that they claim and assert the right and title to all of the oil and natural gas deposits in said land in controversy. Defendants deny, however, that complainant is not informed of the nature of the claim and title they claim under. Defendants deny that they have no right, title or interest in the deposits of oil and natural gas in said land, and defendants deny that their rights and title in and to the land in controversy and the oil and natural gas deposits therein were acquired subsequent to the right the complainant asserts.

Defendants assert that they acquired the right and title
41 in and to the land in controversy and all the oil and natural gas deposits therein long before the complainants claim and defendants positively deny that their rights and title were acquired with notice and knowledge of the lease to the complainant, as alleged in the bill and shown by Exhibit No. 1 attached thereto; and defendants positively deny that

they had any notice or knowledge at the time they acquired their rights and title in and to the land and the oil and natural gas deposits therein of any facts and circumstances sufficient to put them upon notice and inquiry with reference thereto.

VIII.

Defendants deny that they, combining and confederating together, or acting separately and individually, have disregarded any right of the complainant, and they deny that they have violated any right of the complainant, and they deny that without right they unlawfully and wilfully, collectively or individually, entered upon said land on or about April 1, 1907, or at any other date, and with force and arms excluded the complainant, his agents, servants and employes therefrom. Defendants admit that the Kiefer Oil and Gas Company, as lessee of said land for oil and gas mining purposes under leases from the other parties, defendants, have operated and drilled oil and gas wells on said premises, but deny that the oil and gas have been permitted to escape and go to waste in any quantities or amounts. Defendants deny that they have damaged the complainant in the sum of Twenty-five Thousand Dollars, or in any other sum. Defendants admit that they are in possession of the said land and that the same is being operated for
42 oil and gas mining purposes, but they deny that any of the production is being wasted or has been wasted or will be wasted, and they deny that they are converting any of the production to their own use and benefit to the damage of the complainant in any sum [wharsoever]. Defendants deny that said land is worth one hundred thousand Dollars, and they deny that the complainant has the sole and exclusive right to mine oil and natural gas in and upon said land or any part thereof and they deny that his alleged lease is of the value of Seventy-five Thousand Dollars, or of any other value. Defendants deny that the complainant is and will be without means of knowing the amount of such oil and natural gas which the defendants have extracted, are extracting and will extract from said land, because as they aver and plead, there is no market for the production except pipe-line companies operating in this oil field of which this is a part, which pipe-line companies, upon purchasing oil from this land, while said land is in litigaton, will hold the proceeds, (the purchase money), and not pay it to these defendants or anyone else. Defendants aver and plead that the pipe-line companies, the only purchasers of crude oil in this state, are not now and have not been at any time, purchasing the full production of crude oil in this oil Territory, and that by reason thereof it is necessary for the defendants to erect tanks upon the land and store a part of the production awaiting a demand for it in the future by the pipe-

line companies. Defendants deny that this land is being drained by operations upon adjoining property. Defendants deny that they are in the wrongful possession of said property and are wrongfully and forcibly withholding the same from the complainant.

43 IX.

Defendants deny positively that the defendant, Kiefer Oil and Gas Company, is insolvent, and defendants deny that said company has no assets other than its claim to the deposits of oil and natural gas in and under said above described lands; defendants deny that the co-defendants of the Kiefer Oil and Gas Company are unable to respond in damages in any recovery at law which complainant might obtain against them or one or more of them. Defendants deny that the complainant will suffer permanent and irreparable injury unless an injunction is issued restraining the Kiefer Oil and Gas Company, its successors or assigns, and the other defendants, from prospecting for and extracting oil and natural gas from said land or any part thereof.

X.

Defendants, and each of them, in response to complainant's prayer for discovery as to their right, title and interest in the premises, and particularly in and to the deposits of oil and natural gas, say under oath:—

1st. That on the fifth day of June, 1906, the said George Franklin Berryhill and Clementine Berryhill, father and mother of the said Andrew J. Berryhill, deceased, did, for a valuable consideration then and there paid, execute and deliver unto Edmond McKay and Perry McKay, defendants, a general warranty deed, whereby they did grant, bargain, sell and convey unto the said Edmond McKay and Perry McKay, all their right, title and interest in and to the

Northeast Quarter of the Northwest Quarter of Section Eighteen, Township Seventeen North, Range Twelve East, containing forty acres, and being the land in controversy.

44 Said deed was duly acknowledged by the makers, in accordance with the law in force at that time in this jurisdiction, and the same was filed for record and recorded at Sapulpa, Indian Terriotry, on June 5, 1906, in the office of the Deputy United States Court Clerk as Ex-officio Recorder in and for the recording district in the Indian Territory in which this land was situated. A copy of this deed is hereto attached and filed with this answer as "Exhibit A."

Defendants aver and plead that at the time the said defendants, Edmond McKay and Perry McKay purchased the title of George Franklin Berryhill and Clementine Berryhill in this land, accepted the general warranty deed therefor and paid the consideration, the said Edmond McKay and Perry McKay had no knowledge, notice or information of any kind or character that the complainant had obtained from the said George Franklin Berryhill and Clementine Berryhill a departmental oil and gas mining lease upon the said land in controversy, shown by Exhibit No. 1 to complainant's bill.

Defendants aver and plead that said Edmond McKay and Perry McKay were innocent purchasers of the title of George Franklin Berryhill and Clementine Berryhill for a valuable consideration then paid, and that they had no notice, either actual or constructive, to the effect that the complainant had any such lease as claimed by him in his bill filed in this case. Defendants aver and plead that said Edmond McKay and Perry McKay, being innocent purchasers, acquired an absolute unincumbered right and title to all the interest in the said land owned by George Franklin Berryhill and Clementine Berryhill, free from any claim or right that the complainant might otherwise have acquired by virtue of said departmental
45 lease executed to him by said George Franklin Berryhill and Clementine Berryhill.

2nd. In further response to complainant's prayer for discovery, defendants aver and plead that for and in consideration of the sum of $800, and a royalty of one eighth part, paid to Edmond McKay and Perry McKay, Arthur B. Reese, of Independence, Kansas, did, on the twelfth day of October, 1906, obtain from said Edmond McKay and Perry McKay an oil and gas mining lease to the said forty acres of land in controversy. By said instrument said defendants, Edmond McKay, and Perry McKay, with their wives joining therein, granted, demised, leased and let unto the said Arthur B. Reese, his heirs and assigns, said land for the purpose of mining and operating for oil and gas, laying pipe-lines, steam, water, gas and shackle lines to and from adjoining land, and granted him and his assigns the right to build tanks, stations and structures thereon to take care of the products from said land, and also granted to the said lessee the right to go upon, over and across said land for the purpose of operating the same for oil and gas purposes. This said lease is to remain in force for the term of fifteen years from its date, and as long thereafter as oil and gas, or either of them, is produced by said lessee, his heirs or assigns. Defendants aver that said lease,

duly signed and executed by the makers, and acknowledged according to the law then in force, was filed on Oct. 18, 1906 for record in the office of the Deputy Clerk of the United States Court for the Western District of the Indian Territory, at Sapulpa, Indian Territory, in the recording district in which the land is situated. Defendants herewith attach to this answer and make a part thereof, as "Exhibit B," a copy
46 of said lease. Defendants, in this connection, aver and plead that said Arthur B. Reese obtained said lease, as shown by Exhibit B, from defendants Edmond McKay and Perry McKay, upon the land in controversy and paid a consideration of eight hundred dollars therefor without any notice, knowledge or information, of any kind or character, either actual or constructive, that the complainant had prior thereto obtained from George Franklin Berryhill and Clementine Berryhill the departmental oil and gas mining lease as alleged in the bill and shown by Exhibit No. 1 thereto. Defendants therefor aver and plead that the said Arthur B. Reese was and is an innocent purchaser of all the oil and gas mining rights in and to said land owned and possessed by Edmond McKay and Perry McKey for a valuable consideration then paid, and without notice, knowledge or information of any kind or character of the complainant's claims sought to be set up in his bill and evidenced by the lease as shown by Exhibit No. 1 to said bill.

3rd. For further defense in their behalf, these defendants further plead that for and in consideration of the sum of Four Hundred Dollars, paid to Arthur B. Reese, by Josiah G. Davis and C. B. Harmon, on October 17, 1906, said Arthur B. Reese executed an assignment to the said Josiah G. Davis, of an undivided one-eighth interest in and to said lease taken by him from Edmond McKay and Perry McKey, on October 12, 1906, as shown by exhibit "B" to this answer, and a three-eighths undivided interest to the said G. B. Harmon in and to said lease. Defendants further plead that the said Josiah G. Davis and G. B. Harmon accepted the assignment of said four-
47 eighths interest in said lease, and paid said sum of Four Hundred Dollars therefor to the said Arhutr B. Reese, without any notice, knowledge or information of any kind or character, either actual or constructive, that the complainant claimed to have a departmental oil and gas mining lease from the said George Franklin Berryhill and Clementine Berryhill covering the land in controversy, executed and delivered prior thereto, and they further plead that said Josiah G. Davis and G. B. Harmon, had no knowledge, notice or information, either actual or constructive, at the time they accepted said assignments and paid the said Four Hundred Dollars therefor, that

any such departmental lease as alleged by complainant was pending before the Department of the Interior for the approval of the Secretary. Defendants further aver and plead that said Josiah G. Davis and G. B. Harmon, were innocent purchasers of the one-half interest in said lease held by the said Arthur B. Reese from the said Edmond and Perry McKay, dated October 12th, 1906, as shown by Exhibit B to this answer; said assignment by Arthur B. Reese to the said Josiah G. Davis and G. B. Harmon was executed upon the original lease and is shown by Exhibit B to this answer; defendants further aver and plead that on October 19th, 1906, the said Arthur B. Reese, and Harriett I. Reese, his wife, of Independence, Kansas, for a valuable consideration then and there paid by Albert A. Little, did execute and deliver to the said Albert A. Little an assignment of a one-eighth undivided interest in and to said oil and gas lease, held by the said Arthur B. Reese, as shown by Exhibit B to this answer, and defendants further aver and plead
48 that said Albert A. Little, accepted said assignment and paid a valuable consideration therefor, without any notice, knowledge or information of any kind, or character, either actual or constructive, that the complainant had or claimed to have any departmental lease upon the said forty acres in controversy, secured from the said George Franklin Berryhill and Clementine Berryhill set up in his bill, and defendants further plead that the said Albert A. Little, at the time he accepted said assignment, and paid a valuable consideration therefor, had no notice, knowledge or information of any kind or character, either actual or constructive, that the complainant had pending before the Department of the Interior the departmental lease upon said land for oil and gas purposes for the approval of the Secretary. Defendants herewith file as Exhibit "C" to their answer, and make a part hereof, a copy of said assignment from Arthur B. Reese to the said Albert A. Little; defendants also in this connection aver and plead that on November 30th, 1906, Arthur B. Reese, and Harriett I. Reese, his wife, for a valuable consideration, then and there paid by J. A. Hull, did execute and deliver to the said J. A. Hull, of Independence, Kansas, an assignment of an undivided one-fourth interest in and to said oil and gas mining lease held by the said Arthur B. Reese, as shown by Exhibit B to this answer; defendants further aver and plead that the said J. A. Hull accepted said assignment of said one-fourth interest in said lease, and paid a valuable consideration therefor, without any notice, knowledge or information of any kind or character, either actual or constructive, that the
49 complainant had obtained prior thereto the departmental oil and gas mining lease from George Franklin Berryhill and Clementine Berryhill upon the said forty acres set up in the bill; and defendants further plead that the said

J. A. Hull accepted said assignment and paid a valuable consideration therefor without any notice, knowledge or information of any kind or character that the complainant had pending before the Department of the Interior any such departmental lease for the approval of the Secretary of the Interior; defendants further aver and plead that said Josiah G. Davis and G. B. Harmon, and the said Albert A. Little and the said J. A. Hull were all innocent purchasers for a valuable consideration of a seven-eighth interest in said lease held by Arthur B. Reese as shown by Exhibit B to this answer, and that their rights were acquired in and to said lease without any knowledge, notice or information of any kind or character, either actual or constructive, that the complainant claimed any rights to the oil and gas in the forty acres in controversy under any departmental lease executed prior thereto by George Franklin Berryhill and Clementine Berryhill, or that any such lease as alleged by complainant was held by him and was pending before the Department of the Interior for the approval of the Secretary of the Interior. Defendants herewith file as "Exhibit D," to this their answer, and make a part hereof, a copy of the assignment made by Arthur B. Reese to J. A. Hull, heretofore mentioned; defendants further aver and plead that on April 24, 1907, Arthur B. Reese, assigned the remaining one-eighth interest in said lease as shown by Exhibit B to this answer, to Bates B. Burnett, for and in consideration of the sum of One Thousand Dollars, then and there
50 paid, a copy of which assignment is herewith filed as "Exhibit E" to this answer and made a part hereof; defendants further aver and plead that on the same date, to-wit; April 24th, 1907, J. A. Hull, for and in consideration of the sum of Two Thousand Dollars, assigned to the said Bates B. Burnett, his undivided one-fourth interest in said lease, as shown by Exhibit B to this answer; defendants herewith file as Exhibit F to this answer, and make a part hereof, a copy of said assignment of J. A. Hull to the said Bates B. Burnett; defendants further aver and plead that on April 27th, 1907, the said Josiah G. Davis and the said Bates B. Burnett as the owners of a one-half interest in said lease to Arthur B. Reese as shown by Exhibit B to this answer, executed and delivered for a valuable consideration, an assignment of the said one-half interest in said lease to the defendant Kiefer Oil and Gas Company which is now the holder of said one-half interest and the owner thereof. Defendants herewith file as Exhibit "G" to this answer and make a part hereof, a copy of said assignment. Defendants further aver and plead that on April 30th, 1907, the said G. B. Harmon, as the owner of an undivided three-eight interest in said defendants herewith file as Exhibits "J and K" to this answer assigned one-half of his said three-eighths interest to George

W. Barnes, Jr., for a valuable consideration, a copy of which assignment is herewith filed as Exhibit "H" and made a part hereof. In this connection, defendants aver and plead that the said George W. Barnes, Jr., assigned said one-half of said three-eights interest to G. W. Barnes, Sr., on the same date, which assignment is shown by copy filed herewith as "Exhibit
51 I"; defendants aver and plead that the said G. W. Barnes, Sr., did, on the 13th day of May, 1907, undertake to assign to the defendant, Kiefer Oil and Gas Company, his three-sixteenths interest in and to said lease as shown by Exhibit B to this answer, but failed to properly describe the land covered by said lease, and did thereafter on the 18th day of July, 1907 execute a new assignment to the Kiefer Oil and Gas Company of his three-sixteenths interest in and to said lease, in order to correct the error in the former assignment; defendants herewith file as Exhibits "J and K" to this answer a copy of said assignments from the said G. W. Barnes, Sr., to the defendant Kiefer Oil and Gas Company; defendants further aver and plead that on the 26th day of June, 1907, the said Albert A. Little, for a valuable consideration, assigned to the defendant, Kiefer Oil and Gas Company, his remaining one-eighth interest in and to the lease taken by Arthur B. Reese, as shown by Exhibit B to this answer; defendants herewith file as Exhibit "L" to this answer and make a part hereof the said assignment from Albert A. Little to the defendant, Kiefer Oil and Gas Company; defendants aver that on May 20, 1907, said G. B. Harmon assigned all the remaining interest held by him in said lease shown by Exhibit B, to Kiefer Oil and Gas Company, a copy of which assignment is herewith filed as "Exhibit L, No. 1," same having been filed for record at Sapulpa, Indian Territory, May 23, 1907, in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, for the recording district in which the land is situated; defendants therefor further aver and plead that by virtue of said assignments the defendant, Kiefer Oil and Gas Company is the sole and exclusive owner of all the oil and gas mining rights acquired in and to the said forty acres in controversy, under and by virtue of said lease executed by Edmond and Perry McKay to Arthur B. Reese on October 12, 1906, as shown by Exhibit B to this answer; and defendants aver and plead that Arthur B. Reese was an innocent purchaser of the oil and gas rights in and to the land in controversy, for valuable consideration paid, and that all of the subsequent assignees were innocent
52 purchasers, except Bates B. Burnett and George W. Barnes, Jr., and that it as the present owner, is entitled to all the equities acquired by them through Arthur B. Reese and his subsequent assignees as innocent purchasers.

XI.

Defendants, as a further defense, aver and plead that the lease alleged in the complaint to have been executed to the complainant by George Franklin Berryhill and Clementine Berryhill on March 24, 1906, under the rules and regulations as prescribed by the Secretary of the Interior, was executed upon the prescribed form prepared for such leases by the Secretary of the Interior, a correct copy of which is filed with the bill; and defendants further aver and plead that said lease, by agreement between the complainant and the said George Franklin Berryhill and Clementine Berryhill, was executed under the terms and conditions prescribed by the Secretary of the Interior, and of Section 17 of the Act of Congress of June 30th, 1902, known as the "supplemental agreement," and entered into between the Creek Tribe of Indians and the United States; defendants further plead that by the express terms of said lease made by George Franklin Berryhill and Clementine Berryhill to the complainant, and relied upon by complainant in his bill as his muniment of title to the oil and gas in and to the land in controversy, the lease should be and remain absolutely void, and not susceptible of ratification in any manner, and that no rule of estoppel should ever prevent the assertion of its invalidity by said George Franklin Berryhill and Clementine Berryhill until the said lease was approved by
53 the Secretary of the Interior, and these defendants further aver and plead that after the 5th day of June, 1906, before said lease was approved by the Secretary of the Interior, as alleged in the bill, the said George Franklin Berryhill and Clementine Berryhill notified the Secretary of the Interior, through the United States Indian Agent, at Muskogee, Indian Territory, Dana H. Kelsey, that they had sold the land; that they had executed and delivered a deed therefor, and that they withdrew said lease for approval, and protested against the approval of said lease to the complainant by the Secretary of the Interior; defendants further aver and plead that said George Franklin Berryhill and Clementine Berryhill, under the law and under the terms of said lease, had a right to recall said lease from the Interior Department at any time before its approval, and that their action in notifying the Secretary of the Interior not to approve, before its approval, revoked all authority and power of the Secretary of the Interior to approve said lease, and the defendants further aver and plead that after said George Franklin Berryhill and Clementine Berryhill had notified the Department of the Interior that they had sold said land, and directed that the lease be not approved by the Secretary of the Interior, that the Secretary of the Interior had no power, jurisdiction

or authority to approve said lease; and, defendants further plead that any approval by the Secretary of the Interior after such notice and after such withdrawal by said George Franklin Berryhill and Clementine Berryhill, was null and void and ineffectual to confer upon the complainant any right of any kind or character in and to the oil and gas in the land in controversy. Defendants further aver and plead that the complainant had notice of their protest against the approval of said lease, and that the Complainant was informed that they had sold the land and revoked the authority of the Secretary of the Interior before the Assistant Secretary of the Interior approved said lease.

XII.

Defendants for further defense, aver and plead, that under the expressed terms of said lease made by George Franklin Berryhill and Clementine Berryhill to the complainant, and approved by the Assistant Secretary of the Interior on April 19, 1907, the lease was to be of no force or effect until a satisfactory bond, in accordance with the rules and regulations of the Interior Department, was furnished, the terms of said lease applicable thereto being as follows, to-wit:

"It is further agreed and understood that this lease shall be of no force or effect unless the party of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the regulations of July 10, 1903, prescribed by the Secretary of the Interior, which shall be deposited and remain on file in the Indian Office during the life of said lease."

Defendants then further aver and plead that no contract existed between the complainant and the said George Franklin Berryhill and Clementine Berryhill at the time the deed was made by them to the said Edmond and Perry McKey, on June 5, 1906, and that none was to ever exist until such bond was filed by complainant as lessee; defendants therefore further aver and plead that the whole proceedings was a [more] offer by said George Franklin Berryhill and Clementine Berryhill, and nothing more, and therefore not binding upon them, but subject to their withdrawal at any time they saw fit.

XIII.

Defendants further aver and plead that on June 5th, 1906, at the time defendants, Edmond and Perry McKay, took the deed from George Franklin Berryhill and Clementine Berryhill, as

shown by Exhibit A to this answer, they firmly and honestly believed that the devolution of the land in controversy was fixed and controlled by the Creek law of descent and distribution under the provisions of Section 28 of the original agreement negotiated with the Creek Tribe in 1900, approved by Congress on March 1, 1901, and ratified by the Tribe on May 25, 1901; that they were advised and informed that the Creek law controlled the inheritance of the allotment of said Andrew J. Berryhill, deceased, and that under the Creek law the father or the father and mother inherited the fee simple title in and to all the allotment of Andrew J. Berryhill, deceased. Defendants aver and plead that the defendants, Edmond and Perry McKay, acting and relying upon their advice and belief that the Creek law controlled, purchased, as they thought, the fee simple title in and to said lands from George Franklin Berryhill and Clementine Berryhill, father and mother, on June 5, 1906, and then and there paid them the sum of Two Thousand Dollars for the forty acres of land in controversy in this case,
56 with thirty other acres, and accepted from said vendors the general warranty deed shown by Exhibit B to this answer. Defendants aver and plead that Arthur B. Reese, heretofore mentioned, and the defendants, Edmond and Perry McKay, believing that the fee simple title to the land in controversy was in said Edmond and Perry McKay, entered into the lease contract of date of October 12, 1906, as shown by Exhibit B to this answer. Defendants aver and plead that all the assignments of said lease held by Arthur B. Reese, and heretofore mentioned and set forth, were made by and between the assignors and assignees thereof in the firm belief that the fee simple title in and to the land in controversy was in the said Edmond and Perry McKay by virtue of their [generay] warranty deed from George Franklin Berryhill and Clementine Berryhill. Defendants are now advised, and therefore aver and plead, that the devolution of the allotment of Andrew J. Berryhill, deceased, a part of which is the land in controversy, was fixed and controlled by Chapter 49 of Mansfield's Digest of the laws of the State of Arkansas, under and by virtue of the Act of Congress of May 27, 1902, and by virtue of the Supplemental Agreement with the Creek Tribe of Indians, approved by Congress on June 30, 1902.

XIV.

Therefore, in further response to complainant's prayer for discovery from defendants respecting their claim of title in and to the oil and gas in said land, defendants further respond and say that: the uncles and aunts of said Andrew J. Berryhill, deceased, claim to have inherited the fee in the land in con-

troversy, subject to a life estate in the father, George
57 Franklin Berryhill, under the provisions of said Chapter 49 of Mansfield's Digest of the laws of Arkansas, put in force as heretofore alleged. Defendants aver and plead in further response to the prayer for discovery that the defendant, D. A. McDougal, after August 8, 1907, purchased from all the uncles and aunts collateral kindred of said Andrew J. Berryhill all their rights, title and interest in and to the land in controversy for a valuable consideration. Said D. A. MacDougal, one of these defendants, received from all the said uncles and aunts and collateral kindred, deeds of conveyance vesting in said D. A. MacDougal and fee in and to said land in controversy, subject to the life estate of the father, George Franklin Berryhill, owned by the other defendants, Edmond and Perry McKay. Said collateral heirs, the uncles and aunts, were and are Martha E. Lee Kiefer, who conveyed to said D. A. MacDougal on August 20, 1907, by deed, with her husband joining therein, which deed was duly filed for record and recorded in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in the recording district in which the land is situated. A copy of said deed is herewith filed as "Exhibit M." Defendants further aver and plead that Stanford Berryhill, one of the uncles, executed and delivered to said defendant, D. A. MacDougal, a deed conveying his interest to said D. A. MacDougal, said deed being dated August 16, 1907, a copy of which is herewith filed as "Exhibit N." This deed was filed for record on August 23, 1907, in the office of the deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Terri-
58 tory, in and for the recording district in which the land is situated. Defendants further aver and plead that on August 21, 1907, Columbus Berryhill, an uncle, conveyed by deed to said defendant, D. A. MacDougal, all of his interest and title in and to the said land for a valuable consideration, a copy of which deed is herewith filed as "Exhibit O". This deed was filed for record on September 3, 1907, in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in the recording district in which the land is situated. Defendants further aver and plead that on August 16, 1907, Theodore Berryhill, one of the uncles, for a valuable consideration, conveyed all of his right, title and interest in and to the said land in controversy, to said defendant, D. A. MacDougal, a copy of which deed is herewith filed as "Exhibit P." This deed was filed for record in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in the recording district in which the land is situated. Defendants further aver and plead that William Berryhill, one of the uncles, conveyed

all of his interest and title in the land in controversy, to D. A. MacDougal, for a valuable consideration, on August 16, 1907, a copy of which deed is herewith filed as "Exhibit Q". This deed was filed for record on August 23, 1907, in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in the recording district in which the land is situated. Defendants further aver and plead that Mary Kiefer, one of the aunts, with her husband joining, conveyed by deed, for a valuable consideration, on August 16, 1907, all of her right, title and interest in and to the
59 land in controversy to defendant, D. A. MacDougal, a copy of which deed is herewith filed as "Exhibit R." This deed was filed for record on August 23, 1907, in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in the recording district in which the land is situated. Defendants further aver and plead that Mrs. Josie Morton, an aunt, with her husband joining therein, did, on August 20, 1907, for a valuable consideration, transfer and convey all of her right, title and interest in and to the land in controversy to the defendant, D. A. MacDougal, a copy of which deed is herewith filed as "Exhibit S". This deed was filed for record on August 23, 1907, in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in and for the recording district in which the land is situated.

In further response to complainant's prayer for discovery, and as a muniment of title in the defendant, Kiefer Oil and Gas Company to the oil and gas rights to the land in controversy, defendants state that on October 21, 1907, defendant, D. A. MacDougal, with his wife, Myrtle A. MacDougal, joining therein, entered into a lease contract with the defendant, Kiefer Oil and Gas Company, whereby said D. A. MacDougal, for a valuable consideration, and a one-fifth part of all oil produced and saved from the premises by said Kiefer Oil and Gas Company, its successors and assigns, did grant, demise, lease and let unto said Kiefer Oil and Gas Company, its successors and assigns, for the sole and only purpose of mining and operating for oil and gas, the said North-
60 east Quarter of the Northwest Quarter of Section Eighteen, Township Seventeen North, Range Twelve East, containing forty acres, being the land in controversy, for and during the term of fifteen years from and after October 12, 1906, and so long after the expiration of the fifteen years as oil or gas, or either of them, is produced from the land by defendant, Kiefer Oil and Gas Company, its successors or assigns, in paying quantities. In this lease contract the defendant, D. A. MacDougal, expressly disclaims to own or hold any

further right and title in the land, other than a fee subject to an estate owned by Edmond and Perry McKay in the surface rights during the life of George Franklin Berryhill. This lease contract was duly signed and accepted by defendant, Kiefer Oil and Gas Company, on October 26, 1907. This lease contract was filed for record on the .... day of October, 1907, in the office of the Deputy United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in the recording district in which the land is situated. Said lease contract, with all its terms and conditions is herewith shown by "Exhibit T," attached to this answer and made a part thereof.

Defendants, in further response to complainant's prayer for discovery and as a muniment of the right and title of defendant, Kiefer Oil and Gas Company to occupy said land in controversy, and explore the same for oil and gas, state that on October 28, 1907, the defendants Edmond McKay and Perry McKay, entered into a contract with Kiefer Oil and Gas Company, for a valuable consideration therein stated,
61 whereby they did let, lease and demise to the said Kiefer Oil and Gas Company, its successors and assigns, for a term of fifteen years from and after October 12, 1906, the land in controversy for the purpose of erecting tanks thereon in which to store oil produced therefrom. The said Edmond and Perry McKay in this lease contract also granted to the defendant, Kiefer Oil and Gas Company, the right to construct, maintain and operate collateral lines of pipe and piping such as may be necessary for the reasonable and convenient use of tanks, or any of them, erected and maintained upon the land by the Kiefer Oil and Gas Company, and with, in addition thereto, the right to connect said tanks with the main pipe-line of any pipe-line company doing a pipe-line business in the Indian Territory, or in the new State of Oklahoma, interstate or intrastate. By the terms of this contract the said defendants, Edmond and Perry McKay, ratified and confirmed in all respects, in all of its terms and conditions, as fully and completely as if therein set out specifically, the lease executed on October 12, 1906, by said Edmond and Perry McKay, to Arthur B. Reese, as shown by Exhibit B to this answer, and owned and held by defendant, Kiefer Oil and Gas Company, under the various assignments thereof heretofore set out. Defendants herewith file, as "Exhibit U" a copy of said lease contract and make it a part of this answer.

XV.

As a matter of law, the defendants aver and plead that neither George Franklin Berryhill nor his wife, Clementine

62 Berryhill, (one or both), acquired any right, title, interest or estate in and to the land in controversy other and further than an estate during either the life of George Franklin Berryhill, the father, or the life of George Franklin Berryhill, the father, and Clementine Berryhill, the mother in succession, and, as a consequence, they further aver and plead that said George Franklin Berryhill and Clementine Berryhill had no estate in the oil and gas in and beneath the land in controversy, and could not and did not confer upon the complainant any right, title or interest in and to the oil and gas deposits in said land by virtue of the lease executed by them to complainant on March 24, 1906, as shown by Exhibit No. 1 to complainant's bill. Defendants aver and plead that complainant's lease, for that reason, was and is ineffectual and not enforcible, the mineral rights and the title therein at that time being vested in the uncles and aunts and collateral kindred of said Andrew J. Berryhill, deceased, no development having been made on the land prior thereto for oil and gas purposes.

Defendant aver and plead that the Kiefer Oil and Gas Company, defendant, is rightfully and lawfully entitled to operate the land in controversy for oil and gas purposes and extract said minerals therefrom under and by virtue of the lease held by it executed by Edmond McKay and Perry McKay to Arthur B. Reese in connection and conjunction with the lease contract executed to it, Kiefer Oil and Gas Company, by D. A. MacDougal and wife, on October 21, 1907, and accepted by said Kiefer oil and Gas Company on October 26, 1907, as shown by Exhibit "T" to this answer, with, in addition thereto, the

63 ratification as shown by the contract made between defendant, Kiefer Oil and Gas Company, and Edmond and Perry McKay on October 28, 1907, and shown by Exhibit U, whereby the lease executed on October 12, 1906 to Arthur B. Reese, and now owned by Kiefer Oil and Gas Company, was in all things confirmed.

XVI.

Defendants further aver and plead that if they be mistaken as to the quantum of title taken by George Franklin Berryhill or George Franklin Berryhill and wife, Clementine Berryhill, and it should be held and decided by the Court that George Franklin Berryhill or George Franklin Berryhill and wife, Clementine Berryhill, was or were vested with the fee simple title in and to the land in controversy under the laws of descent and distribution in force at the time, then defendants rely upon their superior rights to the oil and gas in the land in controversy under the deed from George Franklin Berryhill and Clementine Berryhill to Edmond and Perry McKay,

heretofore set up, and the lease made by them to Arthur B. Reese on October 12, 1906, now owned by Kiefer Oil and Gas Company. Defendants base this claim of right under the defenses, statements and allegations set forth in this answer.

XVII.

All allegations contained in the complainant's bill not already specifically denied, admitted or avoided, are here now generally denied, and denied as fully as though separately and specifically denied.

Defendants having thus made full answer and discovery to all the matters and things contained in the bill, pray
64 to be dismissed hence with all their costs in this behalf incurred.

WEST & MELLETTE,
GIBSON & RAMSEY,
Counsel for Defendants.

We hereby adopt, approve and sign the above as our answer.

KIEFER OIL AND GAS COMPANY;
Attest: By G. W. Barnes, President.
E. C. Bothwell, Secretary. D. A. McDOUGAL,
(Corporate seal) EDMOND McKAY,
PERRY McKAY.

State of Oklahoma,
County of Muskogee—ss.

On the 7 day of January, 1908, at Muskogee, in the County and State aforesaid and before me, personally appeared G. W. Barnes, who being first duly sworn, deposes and says that he is the President of the Kiefer Oil and Gas Company, one of the defendants above named; that he has read the foregoing answer and knows the contents thereof; that the same is true, of his own knowledge, except as to matters therein stated on information and belief, and as to those matters, he believes them
65 to be true.

G. W. BARNES.

Sworn to before me and subscribed to in my presence on this the 7 day of January, 1908.

(Seal) E. D. SWEENEY.
Notary Public for the State of Oklahoma,
County of Muskogee.
My Commission expires April 7, 1909.

State of Oklahoma,
County of Muskogee—ss.

On the 7 day of January, 1908, at Muskogee, in the County and State aforesaid, personally appeared Perry McKay and Ed-

mond McKay, who being first duly sworn, depose and say; that they are defendants in the above styled cause; that they have read the foregoing answer and know the contents thereof; that the same is true of their own knowledge in regard to all those matters and transactions stated in the answer in which they took a part, or were parties to, and believe all the other statements and matters set forth in the answer to be true.

PERRY McKAY,
EDMOND McKAY.

Sworn to before me and subscribed to in my presence on
66 this the 7th day of January, 1908.

(Seal) MARTHA H. BROWN,
Notary Public for the State of Oklahoma,
County of Muskogee.
My Commission expires Oc. 19, 1910.

State of Oklahoma,
County of Muskogee—ss.

On the 7 day of January, 1908, at Muskogee, in the County and State aforesaid, personally appeared D. A. MacDougal, who being first duly sworn, deposes and says; that he is a defendant in the above styled cause; that he has read the foregoing answer and knows the contents thereof; that the same is true, of his own knowledge, except as to matters therein stated on information and belief, and as to those matters, he believes them to be true.

D. A. McDOUGAL.

Sworn to before me and subscribed to in my presence on this the 7 day of Jauuary, 1908.

(Seal) MARTHA H. BROWN,
Notary Public for the State of Oklahoma,
County of Muskogee.
My Commission expires Oct. 19, 1910.

67 (Exhibit "A")

General Warranty Deed.

(With Relinquishment of Dower.)

This Indenture, made and entered into this 5th day of June one thousand, nine hundred and six by and between George F. Berryhill and Clementine Berryhill his wife, of Sapulpa, I. T. party of the first part, and Edmond McKay and Perry McKay of Bixby, I. T., parties of the second part.

Witnesseth: That the said parties of the first part, for and in consideration of the sum of Two Thousand and no/100 Dol-

lars in hand paid, the receipt of which is hereby acknowledged, does hereby grant, bargain, sell, convey and confirm unto the said parties of the second part the following described Real Estate and premises situate in the Muskogee or Creek Nation, and within the limits of the Indian Territory, to-wit: The northeast quarter of the North West quarter of section 18-the East Half of the North West quarter of the North East quarter and the South West quarter of the northwest Quarter of the North East Quarter of Section 13-Township-17-North and Range-12- East, of the Indian Base and Meridian, in the Ind. Ter. containing-70-acres, more or less, the above described land being part of the allottment of Andrew J. Berryhill our deceased son. Said Andrew J. Berryhill died about October 1st, 1901. We being the sole and only heirs of the said Andrew J. Berryhill, deceased, together with all the improvements thereon, and the appurtenances and immunities thereunto belonging or in any wise appertaining thereto.

To Have And To Hold the aforesaid premises to the said Edmond McKay & Perry McKay and unto their heirs and successors in fee simple forever; and we the said George F. Berryhill and Clementine Berryhill for ourselves and our heirs, executors and administrators do covenant with the said Edmond McKay & Perry McKay and their heirs, successors and assigns, that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that we have good right to sell and convey the same to the said Edmond McKay & Perry McKay as aforesaid; and that we will and our successors, heirs, executors and administrators shall warrant and defend the same to the said Edmond McKay & Perry McKay and their heirs, successors and assigns forever against the lawful claims and demands of all persons.

And I, Clementine Berryhill of Sapulpa, I. T., wife of the said George F. Berryhill for and in consideration of the said sum of money, do hereby release and relinquish unto the said parties of the second part all my right and dower and homestead in and to the said lands.

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

Witness to mark:
Lafe Speer,
Al Caymod.

his
GEORGE F. x BERRYHILL. (Seal)
mark
CLEMENTINE BERRYHILL. (Seal)

United States of America,
Indian Territory,
Western Judicial District.

Be It Remembered, That on this day came before me, the undersigned, a Notary Public in and for the Western Judicial District of the Indian Territory, aforesaid, duly com-
68 missioned and acting as such George F. Berryhill and Clementine Berryhill, his wife, to me personally well known as the persons whose names appear in the within and foregoing deed of conveyance, as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do so hereby certify.

And I further certify that on the same day also voluntarily appeared before me, the said Clementine Berryhill, wife of said George F. Berryhill to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband, declared that she had of her own free will, executed said deed, and signed and sealed the relinquishment of dower and homestead in the foregoing deed for the consideration and purposes therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public, on this 5th day of June, 1906.

(Seal)

LAFE SPEER,
Notary Public.

My Commission expires August 18th, 1907.

Indorsed: Indian Territory, Western District, at Sapulpa, Ind. Ter. I hereby certify that this instrument was filed for record in my office on June 5, 1906, at 10 o'clock A. M., and is duly recorded in Record 9, page 387.

OTIS LORTON,
Deputy Clerk & Ex-officio Recorder.

69 (Exhibit "B".)

Agreement, Made and entered into the 12th. day of October, A. D., 1906 by and between Edmond McKay, and Florence McKay, his wife, and Perry McKay and Gusta McKay, his wife, of Bixby, Ind. Ter. party of the first part, and Arthur B. Reese, of Independence, Kansas, party of the second part,

Witnesseth: That the said party of the first part for and in consideration of the sum of One Dollar to them in hand well and truly paid by the said party of the second part, the re-

ceipt of which is hereby acknowledged, and of the covenants and agreements hereinafter contained on the part of the said part of the second part, to be paid, kept and performed, hereby grant, demise, lease and let unto the said party of the second part, his heirs or assigns for the sole and only purpose of mining and operating for oil and gas, and of laying pipe lines, steam, water, gas and shackle lines to and from adjoining land, and of building tanks, stations and structures thereon to take care of said products, with the right of going in upon, over and across said land for the purpose of operating the same; also with the right to subdivide and release the same or any part thereof. All of the following described tracts of land situate in the Creek Nation and within the Indian Territory to-wit: The North-East Quarter (1/4) of the North-West Quarter (1/4) of Section 18, of Township 17 North, of Range 12 East, of the Indian Meridian and containing Forty (40) acres, more or less according to the Government survey thereof.

It is Agreed, That this lease shall remain in force for the term of fifteen years from this date, and as long thereafter as oil or gas, or either of them, is produced therefrom by the party of the second part, his heirs or assigns.

In Consideration of the Premises, The said party of the second part covenants and agrees 1st—To deliver to the credit of the first party their heirs or assigns, free of cost, in pipe line to which he may connect his wells, the equal one-eighth (1/8) part of all oil produced and saved from the leased premises. 2nd—To pay to the first party, their heirs or assigns, one Hundred and Fifty and No/100 ($150.00) Dollars per year for the gas from each and every gas well drilled on said premises, the product from which is marketed and sold off the premises, said payment to be made on each well within sixty days after commencing to use the gas therefrom, as aforesaid, and to be paid yearly thereafter while the gas from said well is so used. First party to fully use and enjoy said premises for farming purposes, except such parts as may be used by second party for the purposes aforesaid, second party agreeing to locate all wells so as to interfere as little as possible with the cultivated portions of the farm. First party to have the right and privilege of using at their own risk sufficient gas for one dwelling house on the premises from any gas well found on said described lease, they to make their own connections and it is agreed that no well shall be drilled within 200 feet of the buildings now on the premises without the consent of the first party.

It is Provided, That this lease shall become null and void if a well is not commenced on the premises within one year

from the date hereof or unless the lessee shall pay Forty ($40.00) Dollars in advance for each additional year commencement is delayed; and it is agreed that the commencement of such well shall be and operate as a full liquidation of all said rentals under this lease during the remainder of the term. Such payment may be made direct to the lessors or deposited to their credit in the Bank of Mounds, I. T.

70 It is Agreed, That the second party is to have the privilege of using sufficient water oil and gas, from the premises to run all necessary machinery, and at any time to remove all buildings, machinery and fixtures placed on said premises; and further, upon the payment of One Dollar, at any time, by the party of the second part, his heirs or assigns, or by a deposit of said sum, together with all amounts due hereunder, in the Bank aforesaid, said party of the second part, his heirs or assigns, shall have the right to surrender this lease for cancellation and a delivery of said lease to first party in person or a deposit of the same with the money in the Bank aforesaid, shall operate as complete surrender of all of second party, his heirs or assigns interest in said property after which all payments and liabilities thereafter to accrue, under and by virtue of its terms, shall cease and determine and this lease become absolutely null and void.

All provisions hereof shall extend to the heirs, successors and assigns of the respective parties hereto.

In Witness Whereof, Said parties have hereto set their hands and seals the day and year aforesaid.

EDMOND McKAY,
FLORENCE McKAY,
PERRY McKAY,
GUSTA McKAY,
ARTHUR B. REESE.

Mounds I. T. 10/17/1906.

For and in consideration of the sum of One Dollar in hand paid by Josiah G. Davis and G. B. Harmon, the receipt whereof is hereby duly acknowledged, I hereby grant, bargain, sell and convey and assign unto the said Josiah G. Davis an equal one eighth (1/8) interest and unto the said G. B. Harmon an equal three eighths (3/8) interest, in the within and foregoing Oil and Gas Lease.

(Signed) ARTHUR B. REESE.

United States of America,
Indian Territory,
Western District—ss.

On this 13th day of October, A. D. 1906, before me, the undersigned Notary Public within and for the Western District of

the Indian Territory, personally appeared Edmond McKay, to me personally well known to be one of the persons described in the within and foregoing instrument as grantors, and acknowledged that he had subscribed and executed the same for the considerations and purposes therein set forth and mentioned as his free and voluntary act and deed.

I further certify that on the same day personally appeared before me, Florence McKay, wife of the said Edmond McKay, to me personally well known to be one of the persons who executed the within and foregoing instrument, and in the absence of her husband, declared that she had, of her own free will, executed the within and foregoing instrument, and that she relinquished all her right of dower in and to the oil and gas in and under the premises described in the within and foregoing instrument, for the purposes and considerations therein set forth and mentioned without compulsion or undue influence of her said husband, and I do hereby so certify.

Witness my hand and seal as such Notary Public the day and year last above written.

(Seal) E. B. HARRIS, Notary Public.

My commission expires May 15th 1907.

71 United States of America,
Indian Territory,
Western District—ss.

On this 13th day of October, A. D. 1906, before me, the undersigned Notary Public within and for the Western District of the Indian Territory, personally appeared Perry McKay, to me personally well known to be one of the persons described in the within and foregoing instrument as grantors, and acknowledged that he had subscribed and executed the same for the considerations and purposes therein set forth and mentioned as his free and voluntary act and deed.

I further certify that on the same day personally appeared before me, Gusta McKay, wife of the said Perry McKay, to me personally well known to be one of the persons who executed the within and foregoing instrument, and in the absence of her husband, declared that she had, of her own free will, executed the within and foregoing instrument, and that she relinquished all her right of dower in and to the oil and gas in and under the premises described in the within and foregoing instrument, for the purposes and considerations therein set forth and mentioned without compulsion or undue influence of her said husband, and I do hereby so certify.

Witness my hand and seal as such Notary Public the day and year last above written.

(Seal) E. B. HARRIS, Notary Public.

My commission expires May 15th 1907.

Endorsed: Indian Territory, Western District, At Sapulpa, Ind. Ter. I hereby certify that this instrument was filed for record in this office on Oct. 18 1906 at 3 o'clock P. M., and is duly recorded in Record 19 page 132.

O. M. IRLAN,
Deputy Clerk & ex-officio Recorder.

72 Exhibit "C".

#13414.

Arthur B. Reese, et ux,
To
Albert A. Little,

Assignment.

This agreement made and entered into this 19th. day of October, A. D. 1906, by and between Arthur B. Reese and Harriet I. Reese, his wife, of Independence, Kansas, parties of the first part, and Albert A. Little, of Independence, Kansas, party of the second part:—

Witnesseth: That, Whereas, the said Arthur B. Reese is the owner of oil and gas leases on the following described premises, to-wit:—The East One-half (½) of the Northwest quarter (¼) and the West-half (½) of the Northeast quarter (¼) of Section Nineteen (19), Township Seventeen (17) North, Range Twelve (12) East, and the North-east quarter (¼) of the Northwest (¼) of Section Eighteen (18), Township Seventeen (17) Range Twelve (12) East, Creek Nation, Indian Territory, containing Two Hundred acres (200) more or less, according to the Government survey thereof.

Now, Therefore, in and for the consideration of the sum of Twelve Hundred Fifty Dollars ($1250.00), by said second party, paid to said first party, receipt whereof is hereby asknowledged, the said parties of the first part, do hereby sell, transfer, and assign unto the said Albert A. Little, said second party, his heirs, executors, administrators and assigns, an undivided one-eighth interest in and to the oil and gas leases hereinbefore described, subject to the royalties, terms and conditions of the said leases, said leases being of record, in the office of the Clerk of the United States Court, Sapulpa, Eighth Recording District, Indian Territory.

In Witness Whereof, the said parties have hereunto set their hands this 19th. day of October, 1906.

73 Witnesses:
F. R. Carmen.
E. D. Forquer.

ARTHUR B. REESE.
HARRIET I. REESE.
ALBERT A. LITTLE.

State of Kansas,
County of Montgomery—ss.

Be It Remembered, That on this day came before me, the undersigned, a Notary Public, within and for the County and State aforesaid, duly commissioned and acting as such, Arthur B. Reese, to me personally well known as one of the parties grantors in and within the foregoing deed of conveyance, and stated that he executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I do further certify that on this day also voluntarily appeared before me, the said Harriet I. Reese, wife of said Arthur B. Reese, to me personally well known to be the person whose name appears upon the within and foregoing deed of conveyance and in the absence of her said husband, declared that she had of her own free will, executed said deed, and signed and sealed the relinquishment of dower and homestead therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public in this 19" day of October, 1906.

(Seal)

R. W. KELLOUGH,
Notary Public.
Montgomery Co. Kas.

My Commission expires on the 22" day of April, A. D. 1908.

Filed for record Oct. 22, 1906, at 8 A. M. and recorded in Book 20, Page 29.

74 Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of Assignment #13414.....as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

Exhibit "D".

75 #14065.

Arthur B. Reese, et ux,
To
J. A. Hull,

Assignment.

This agreement made and entered into this 30th day of November, A. D. 1906, by and between Arthur B. Reese, and Harriet I. Reese, his wife, of Independence, Kansas, parties of the first part, and J. A. Hull of Independence Kansas, party of the second part:

Witnesseth: That, Whereas, the said Arthur B. Reese is the owner of leases for oil and gas on the following described premises, situated in the Creek Nation, Indian Territory, to-wit: The East One-half (½) of the Northwest quarter (¼) and the West One-half (½) of the Northeast quarter (¼) of Section Nineteen (19), Township Seventeen (17), North, Range Twelve East (12), and the Northeast quarter (¼), of the Northwest quarter (¼) of Section Eighteen (18) Township Seventeen (17), Range Twelve (12) East, and the West One-half (½) of the Southwest quarter (¼) of the Southwest quarter (¼) of the Southeast quarter (¼), and the Southwest quarter (¼) of the Northwest quarter (¼), of the Southwest quarter (¼) of the Southeast quarter (¼) of Section Eight (8), Township Seventeen (17), Range Twelve East (12), containing Two hundred Seven and one-half (207 ½) acres, according to the Government survey thereof;

Now, Therefore, in and for the consideration of the sum of One Dollar ($1.00) and other valuable considerations, receipt whereof is hereby acknowledged, the said party of the first part hereto, do hereby sell, transfer, convey and assign unto the said J. A. Hull's, said second party, his heirs, executors, administrators and assigns, an undivided three-fourths (¾) interest in and to said oil and gas lease covering the East One-half (½) of the Northwest quarter (¼) and the West One-half
76 (½) of the Northeast quarter (¼), of Section Nineteen (19) Township Seventeen (17) North, Range Twelve (12) east, and in and to the oil and gas lease covering the West One-half (½) of the Southwest quarter (¼) of the Southwest quarter (¼) of the Southeast quarter (¼), and the Southwest quarter (¼) of the North-

west quarter (¼) of the Southwest quarter (¼) of the Southeast quarter (¼) of Section Eight (8), Township Seventeen (17), Range Twelve East, and an undivided One-fourth (¼) interest in and to the said oil and gas lease covering the Northeast quarter (¼) of the Northwest quarter (¼) of Section Eighteen (18), Township Seventeen (17), Range Twelve (12) East, all situated in the Creek Nation, Indian Territory, said leases being on record in the office of the Clerk of the United States Court, Sapulpa, Eighth Recording District, Indian Territory.

In Witness Whereof, the said parties of the first part have hereunto set their hands this 30th day of November, 1906.

ARTHUR B. REESE.
HARRIET I. REESE.

State of Kansas,
County of Montgomery—ss.

Be It Remembered, That on this day came before me, the undersigned, a Notary Public, within and for the County and State aforesaid, duly commissioned and acting as such, Arthur B. Reese, to me personally well known as one of the parties grantors in and within the foregoing deed of conveyance, and stated that he executed the same for the consideration and [puposes] therein mentioned and set forth, and I do hereby so certify.

And I do further certify that on this day also voluntarily appeared before me, the said Harriet I. Reese, wife of
77 said Arthur B. Reese, to me personally well known to be the person whose name appears upon the within and foregoing deed of conveyance, and in the absence of her husband, declared that she had of her own free will, executed said deed, and signed and sealed the relinquishment of dower and homestead therein expressed for the purpose therein contained and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public, on this 30th day of November, 1906.

E. B. MUSTON, Notary Public.
(Seal) Montgomery Co. Kans.
My Commission expires on the 29th day of May, A. D. 1910.

Filed for record Dec. 20, 1906, at 8 A. M., and recorded in Book 20, Page 161.

Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of Assignment #14065 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

Exhibit "E".

78 #15967.

Arthur B. Reese,
To
Bates B. Burnett,

Assignment.

Know All Men By These Presents: That I, Arthur B. Reese, for and in consideration of the sum of $1000.00 to me in hand paid by Bates B. Burnett, do hereby grant, sell, transfer and assign to Bates B. Burnett my undivided one-eighth interest in and to an Oil and Gas Lease given by Edmond McKay and Florence McKay, his wife, and Perry McKay and Gusta McKay, his wife, on the 12th day of October, 1906, covering the Northeast quarter of the Northwest quarter of Section 18, Twp. 17, North, Range 12 East.

Witness my hand this 24th. day of April, 1907.

ARTHUR B. REESE.

United States of America,
Western District, Ind. Ter.—ss.

Be It Remembered, that on this 24th day of April, 1907, personally appeared before me the undersigned, a Notary Public, within and for the Western District of the Ind. Ter. Arthur B. Reese, to me personally well known to be the person who signed the foregoing assignment, and stated to me that he had executed the same for the consideration and purposes therein mentioned and set forth.

Witness my hand and seal as such Notary Public, this 24th. day of April, 1907.

LAFE SPEER, Notary Public.

(Seal) Western Dist. I. T.
My commision expires August, 18th, 1907.

Filed for record Apr. 24, 1907, at 4 P. M. and recorded in Book 20, Page 640.

79

Certificate of True Copy.

United States of America,
Indian Territory, Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of assignment #15967 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

80

Exhibit "F".

#15966.

J. A. Hull,
To
Bates B. Burnett.

Assignment.

Know All Men By These Presents: That I, J. A. Hull for and in consileration of the sum of $2000.00 Two Thousand Dollars, to me in hand paid by Bates B. Burnett, do hereby grant, sell, transfer and assign to Bates B. Burnett, my undivided one-fourth (¼) interest in and to an Oil and Gas Lease given by Edmond McKay and Florence McKay, his wife, and Perry McKay aad Gusta McKay, his wife, to Arthur B. Reese, on the 12th. day of October, 1906, covering the Northeast quarter of the Northwest quarter of Section Eighteen, Township Seventeen North, Range Twelve East.

The said one-fourth interest being duly assigned to me by the said Arthur B. Reese.

Witness my hand this 24th. day of April, 1907.

J. A. HULL.

United States of America,
Western District, Indian Territory—ss.

Be it Remembered, That on this 24th. day of April, 1907, personally appeared before me the undersigned, a Notary Public within and for the Western District of the Indian Territory, J. A. Hill, to me personally well known to be the person who signed the foregoing assignment, gnd stated to me that he had executed the same for the consideration and purposes therein mentioned.

Witness my hand and seal as such Notary Public this 24th. day of April, 1907.

LAFE SPEER, Notary Public.

(Seal) Western Dist. I. T.
My Commission expires Aug. 18, 1907.

Filed for record Apr. 24, 1907, at 4 P. M. recorded in Book 20, Page 639.

81 Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of Assignment #15966 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

Exhibit "G".

82 #16019.

Assignment of Interest in Oil and Gas Mining Lease.

Know All Men By These Presents:—

That, Whereas, Arthur B. Reese, the lessee named in a certain oil and gas mining lease from Edmond McKay and others, dated on the 12th day of October, 1906, and recorded in the office of the Recorder within and for the Eight Recording District of the Indian Territory at Sapulpa, in Book 19 at Page 132, on the Northeast Quarter of the Northwest quarter of Section 18, Township 17, North, and Range Twelve 12 East, in the Creek Nation, Indian Territory; conveyed and assigned to Bates B.

Burnett a one-eighth interest in said oil and gas mining lease, and to Josiah G. Davis a one-eighth interest in and to said oil and gas mining lease, and to J. A. Hull, a one-fourth interest in said oil and gas mining lease, and the said J. A. Hull assigned to said Bates B. Burnett his one-fourth interest in said oil and gas mining lease; all of which said assignments are of record in the office of the Recorder within and for the Eighth Recording district of the Indian Territory, at Sapulpa;

Now Thereof, the said Bates B. Burnett, for and in consideration of the sum of Three Thousand and no/100 dollars to him in hand paid by the Kiefer Oil and Gas Company, a corporation, receipt of which is hereby acknowledged, and the said Josiah G. Davis, for and in consideration of the sum of One Thousand and no/100 Dollars, to him in hand paid by the said Kiefer Oil and Gas Company, receipt of which is hereby acknowledged, do hereby assign, transfer and set over unto the said Kiefer Oil and Gas Company, their respective interests in said oil and gas mining lease of three-eights and one-eighth, respectively, hereby respectively quitclaiming to the said Kiefer Oil and Gas Company all their said respective interests in and to said Oil and Gas Mining lease.

83 Witness our hands this 27th day of April, 1907.

BATES B. BURNETT,
JOSIAH G. DAVIS.

United States of America,
Indian Territory,
Western District—ss.

Be It Remembered, That on this day personally appeared before me, a Notary Public, within and for the District and Territory aforesaid, Bates B. Burnett and Josiah G. Davis, to me personally well known to be the parties whose names are subscribed to the within instrument of assignment, and each acknowledged that he has subscribed and executed the said instrument for the respective considerations and purposes therein mentioned and set forth, and I do hereby so certify.

Witness my hand and seal this 29th day of April, 1907.

(Seal) E. B. HUGHES, Notary Public.
Western District, Ind. Ter.

My Commission expires May 18, 1909.

Filed for record Apr. 29, 1907, at 11 A. M. and recorded in book 24, at Page 156.

Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrment hereto attached is a full, true, and correct copy of Assignment #16019 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

Exhibits "H and I."

84 #16053.

G. B. Harmon,
To
George W. Barnes, Jr.

Assignment.

This agreement, made and entered into this 30th day of April, A. D. 1907, by and between G. B. Harmon, of Mounds, party of the first part, and George W. Barnes, Jr., of Kiefer, Indian Territory, party of the second part:

Witnesseth, That Whereas, The said G. B. Harmon is the owner of an undivided three-eighth (3/8) interest in and oil and gas lease, executed by Edmond McKay, and Perry McKay and their wives to Arthur B. Reese, in, on and covering the following described premises, situated and being within the Creek Nation, Western District of the Indian Territory, to-wit:

The North East Quarter 1/4 of the Northwest quarter (1/4) of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian, containing Forty (40) acres more or less, according to the Government survey thereof.

Whereas, the said party of the second part hereto has purchased an undivided one-half (1/2) interest of the interest of said first party in and to the said oil and gas lease (the same being an undivided three-sixteenths (3/16) interest, which is hereby purchased, in the whole of said oil and gas lease.)

Now Therefore, in and for the consideration of the sum of One hundred and Fifty ($150.00) Dollars (the receipt whereof is

hereby duly acknowledged, the said G. B. Harmon does hereby sell, convey, transfer and assign unto the said George W. Barnes, Jr., his heirs, executors, administrators and assigns an undivided one-half (1/2) interest of the interest of the said G. B. Harmon in and to the said oil and gas lease (the same being the undivided Three-Sixteenths (3/16) interest in and to the whole of said oil and gas lease which is hereby sold, conveyed,
85 transferred and assigned.)

In Witness Whereof, said party of the first part has hereunto set his hand, and affixed his seal on this day and year first above written.

(Seal)

G. B. HARMON.

Witnesses:
J. F. Bostwick,
Grant Bowden.

United States of America,
Indian Territory,
Western District—ss.

Be It Remembered, that on this 30th. day of April, A. D. 1907, before me, the undersigned, a Notary Public, within and for the District aforesaid, duly commissioned and acting as such, personally appeared G. B. Harmon, grantor in the within and foregoing instrument of conveyance, personally well known to me to be such person who signed and executed the said instrument, and such person duly acknowledged the signing and execution of the same for the considerations, uses, and purposes therein set forth and mentioned, as his free and voluntary act and deed, and I do hereby so certify.

In Testimony Whereof, I have hereunto subscribed my name, and affixed my Notarial seal, the day and year last above written.

JOHN H. CAIN,
Notary Public.

(Seal) Western Judicial District,
Indian Territory.
My Commission expires May 16, 1908.

Exhibit "I"

For One ($1.00) Dollar, and other valuable considerations, the receipt of which is hereby acknowledged, I hereby sell, assign and transfer all my right, title and interest in and to the within, unto G. W. Barnes of Muskogee, I. T.

In Witness Whereof, I have hereunto set my hand and seal this 30th. day of April, 1907.

GEO. W. BARNES, JR.

86 United States of America,
Indian Territory,
Western District—ss.

Be It Remembered, That on this 30th. day of April, A. D. 1907, before me, the undersigned, a Notary Public, within and for District aforesaid, duly commissioned and acting as such, personally appeared G. W. Barnes, Jr., grantor in the within and foregoing instrument of conveyance, personally well known to be such person who signed and executed the said instrument, and such person acknowledged the signing and executing of same to be his free and voluntary act and deed, and I hereby so certify.

In Testimony Whereof, I hereto subscribed my name and affixed my seal the day and date above written.

JOHN H. CAIN,
Notary Public.

(Seal) Western Judicial District.
Indian Territory.

My Commission expires May 16, 1908.

Filed for record May 2, 1907, at 8 A. M., and recorded in Book 22, at Page 547.

Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of Assignment #16053 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

Exhibit "J".

87 #16202.

G. W. Barnes,
To
Kiefer Oil & Gas Co.

Agreement.

This memorandum of agreement, made and entered into this 13th. day of May, A. D. 1907, by and between G. W. Barnes

of Muskogee, Indian Territory, party of the first part, and Kiefer Oil and Gas Company, a corporation of Sapulpa, Indian Territory, party of the second part.

Witnesseth: That, Whereas on the 12th. day of October, A. D., 1906, Edmond McKay and Florence McKay, his wife, and Perry McKay and Gusta McKay, his wife, of Mounds, Indian Territory, did execute unto Arthur B. Reese of Independence, Kansas, a certain oil and gas mining lease covering the N. E. ¼ of the N. W. ¼ of Sec. 18, Twp. 17, N. Rge. 12 E, which said oil and gas mining lease was duly filed for record in the Office of the Clerk of the United States Court at Sapulpa, Indian Territory on the 18th. day of October, A. D. 1906, and was duly recorded at page No. 132, in Book no. 19, and whereas on the 30th. day of April, A. D. 1907, G. B. Harmon of Mounds, I. T., did assign, transfer and convey unto George W. Barnes, Jr., an undivided three-sixteenths interest in and to the lease hereinabove described, which assignment was duly filed for record in the office of the Clerk of the United States Court on the 2nd day of May, A. D. 1907, and recorded at Page No. ..... in Book No. ....., and whereas said three-sixteenths interest was on the same date and in the same instrument assigned to the said G. W. Barnes, of Muskogee, Indian Territory.

Now, Therefore, in consideration of the sum of $1.00 to me in hand paid by the said Kiefer Oil and Gas Company, receipt of which is hereby acknowledged, I do hereby assign, set over and convey unto the said Kiefer Oil & Gas Company all my right, title and interest which I have in and to and under and by virtue of the lease herein described, said interest being an undivided three-sixteenths of the whole.

Witness my hand and seal this day and year first above written.

G. W. BARNES.

United States of America,
Western Judicial District,
Indian Territory—ss.

Be It Remembered, That on this 13th. day of May, 1907, before me, a Notary Public, in and for the District and Territory above mentioned personally appeared G. W. Barnes, to me personally well known as the party grantor in the above instrument and as the party who signed same as the party of the second part and stated and acknowledged to me that he had executed this instrument for the purposes and considera-

tion therein mentioned and set forth as his free and voluntary act and deed, and I do hereby so certify.

E. C. BOTHWELL,
Notary Public.

(Seal) Western District, I. T.

My Commission expires Jan. 2, 1910.

Filed for record May 15, 1907, at 8 A. M., and recorded in Book 24, Page 235.

89 Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western District, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of Assignment #16202 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk an Ex-officio, Recorder.

90 Exhibit "K".

Assignment.

This Agreement, Made and entered into this 18th. day of July, A. D. 1907, by and between G. W. Barnes, of Muskogee, Indian Territory, party of the first part, and Kiefer Oil and Gas Company, a Corporation, organized under the laws of the Indian Territory, with principal office at Sapulpa, I. T. party of the second part:

Witnesseth, That Whereas, The said G. W. Barnes is the owner of an undivided three-sixteenths (3/16) interest in an oil and gas lease executed by Edmond McKay and Perry McKay and their wives to Arthur B. Reese, in, on and covering the following described premises, situated, and being within the Creek Nation, Western District of the Indian Territory, to-wit:

The North-East Quarter (¼) of the North-West Quarter (¼) of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian, containing Forty (40) acres, more or less, according to the Government Survey thereof.

And, Whereas,The said party of the second part has pur-

chased said undivided three-sixteenths (3/16) interest from said party of the first part in and to said oil and gas lease,

Now, Therefore, I and for the consideration of the sum of One and no/100 Dollars ($1.00), the receipt whereof is hereby duly acknowledged, the said G. W. Barnes does hereby sell, convey transfer and assign unto the said Kiefer Oil and Gas Company, its successors and assigns, an undivided three-sixteenths (3/16) interest in said oil and gas lease.

In Witness Whereof, said party of the first part has hereunto set his hand and affixed his seal on this the day and year first above written. This assignment is given to correct the description of the land mentioned in the assignment executed by G. W. Barnes to said Kiefer Oil and Gas Company on May 13th. 1907.

(Seal) G. W. BARNES.

Witnesses:

91

Acknowledgement.

United States of America,
Indian Territory,
Western District—ss.

Be It Remembered, That on this 18th. day of July, A. D. 1907, before me, the undersigned, a Notary Public, within and for the District and Territory aforesaid, duly commissioned and acting as such, personally appeared G. W. Barnes, grantor in the within and foregoing instrument of conveyance, personally well known to me to be such person who signed and executed the said instrument, and such person duly acknowledged the signing and execution of the same for the considerations, uses and purposes therein set forth and mentioned, as his free and voluntary act and deed, and I do hereby so certify.

In Testimony Whereof, I have hereunto subscribed my name, and affixed my Notarial seal, the day and year last above written.

E. C. BOTHWELL,
Notary Public.

(Seal) Western District, I. T.
My Commission expires Jannary 2nd. 1910.

Exhibit "L".

92

Assignment.

This Agreement, Made and entered into this 26th. day of June, A. D. 1907, by and between Albert A. Little, of Inde-

pendence, Kansas, party of the first part, and Kiefer Oil and Gas Company, a Corporation, organized under the laws of the Indian Territory, with principal office at Sapulpa, I. T. party of the second part:

Witnesseth, That Whereas, the said Albert A. Little is the owner of an undivided one-eighth (1/8) interest in an oil and gas lease, executed by Edmond and Perry McKay, and their wives, to Arthur B. Reese, in, on and covering the following described premises, situated and being within the Creek Nation, Western District of the Indian Territory, to-wit:

The North-East Quarter (1/4) of the North-West Quarter (1/4) of Section Eighteen, Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian, containing Forty (40) acres, more or less, according to the Government Survey thereof.

And, Whereas, The said party of the second part hereto has purchased said undivided one-eighth (1/8) interest from said party of the first part in and to said oil and gas lease,

Now Therefore, In and for the consideration of the sum of One Thousand and No/100 Dollars ($1000.00), the receipt whereof is hereby duly acknowledged, the said Albert A. Little does hereby sell, convey, transfer and assign unot the said Kiefer Oil and Gas Company, its successors and assigns, and undivided one-eighth (1/8) interest in said Oil and Gas Lease.

In Witness Whereof, Said party of the first part has hereunto set his hand and affixed his seal on this the day and year first above written.

(Seal) ALBERT A. LITTLE.

Witnesses:

A. T. Alison.

W. P. Lyon.

93 Acknowledgment.

United States of America,
State of Kansas,
County of Montgomery—ss.

Be It Remembered, That on this 20th day of July, A. D., 1907, before me, the undersigned, a Notary Public, within and for the County and State aforesaid, duly commissioned and acting as such, personally appeared Albert A. Little, grantor in the within and foregoing instrument of Conveyance, personally well known to me to be such person who signed and executed the said instrument, and such person duly acknowledged the signing and execution of the same for the considerations, uses and purposes therein set forth and mentioned, as

his free and voluntary act and deed, and I do hereby so certify.

In Testimony Whereof, I have hereunto subscribed my name, and affixed my Notarial seal, the day and year last above written.

CHARLES K. ERRETT, Notary Public.
(Seal) Montgomery Co. Kans.

My Commission expires Aug. 22nd 1908.

Exhibit "L No. 1."

94

George B. Harmon,
#16281. To
Kiefer Oil and Gas Company.

Know All Men By These Presents, That for and in consideration of the sum of $1.00 to me in hand paid, the receipt of which is hereby acknowledged, I do hereby assign, transfer and set over to Kiefer Oil and Gas Company, a corporation organized under the laws in force in the Indian Territory, of Sapulpa, Ind. Ter. all my undivided three-sixteenths interest in and to certain oil and gas mining lease, executed by Edmond McKay and Florence McKay, his wife and Perry McKay and Gusta McKay, his wife, to Arthur B. Reese of Independence, Kansas, covering the N. E. ¼ of N. W. ¼ of Sec. 18, Twp. 17 N. Rge. 12 E. and containing 40 acres more or less.

GEORGE B. HARMON.

United States of America,
Western Judicial District,
Indian Territory—ss.

Be It Remembered, That on this 20th day of May, 1907, before me a Notary Public, within and for the District and Territory above mentioned personally appeared G. B. Harmon, to me personally well known to be the person who executed the foregoing assignment and stated and acknowledged to me that he had executed the same for the purposes and considerations therein mentioned and set forth at his free and voluntary act and deed, and I do hereby so certify.
(Seal)

J. W. McINTOSH, Notary Public.
Western Judicial District,
Indian Territory.

My Commission expires March 25, 1911.

Filed for record May 23, 1907, at 8 A. M. and recorded in Book 27, at Page 16.

95 Certificate of True Copy.

United States of America,
Indian Territory,
Western District—ss.

I, O. M. Irlan, Deputy Clerk of the United States Court in the Western Dstrict, Indian Territory, do hereby certify that the instrument hereto attached is a full, true, and correct copy of Assignment #16281 as the same appears from the records of my office.

Witness my hand and seal of said Court at Sapulpa in said Territory, this 17th day of July, 1907.

O. M. IRLAN,
Deputy Clerk and Ex-officio Recorder.

96 Exhibit "M".

Know All Men By These Presents: That We, Martha E. Lee Kiefer and Smith Kiefer, her husband, of Kiefer, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100) [Dollars] cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all our right, title, claim and interest, in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East hald of the Northwest quarter of the Northeast quarter, and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we the said Martha E. Lee Kiefer and husband, Smith Kiefer, have hereunto set our hands and seals this the 20 day of August, 1907.

(Seal) MARTHA E. LEE KIEFER.
(Seal) SMITH KIEFER.

United States of America,
Western District,
Indian Territory.

On this 20th day of August, 1907, before me, T. J. Sullivan, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Smith Kiefer, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Martha E. Lee Kiefer, wife to the said Smith Kiefer, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at ....., in said district and territory, on the 20th day of August, 1907.

(Seal)

T. J. SULLIVAN, Notary Public.

My commission expires April 8, 1911.

Ex. "M".

97

(Endorsed as follows:)

Martha E. Lee Kiefer and
husband, Smith Kiefer.
Deed
to
D. A. McDougal.

NE/4 of NW/4 of Sec. 18 &
SW/4 of NW/4 of Sec. 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec. 13 all in Twp. 17 N
R 12 E.

Indian Territory, Western District, at Sapulpa, Ind. Ter.

I hereby certify that this instrument was filed for record in my office on Aug. 23, 1907, at 5 o'clock P. M., and is duly recorded in Record 21 page 498.

(Seal)

O. M. IRELAN,
Deputy Clerk & Ex-officio Recorder.

98 Exhibit "N".

Know All Men By These Presents: That I, Stanford Berryhill of Kiefer, Western District, Indian Territory, for and in consideration of the sum of One Hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased, with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the afore granted premises to the said D. A. McDougal, his heirs and assigns forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the afore granted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I, Nannie Berryhill, wife of the said Stanford Berryhill, do hereby release and quitclaim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

In witness whereof, we the said Stanford Berryhill and wife Nannie Berryhill, have hereunto set our hands and seals this the .... day of August, 1907.

Witness to mark:
Mrs. M. L. Dudley.

STANFORD BERRYHILL (Seal)
her
NANNIE x BERRYHILL, (Seal)
mark

United States of America,
Western District,
Indian Territory.

On this ....day of August, 1907, before me, M. Lee Dudley, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Stanford Berryhill, to me

personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Nannie Berryhill, wife of the said Stanford Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Kiefer, in said district and territory on the 16th day of August, 1907.

(Seal) M. LEE DUDLEY, Notary Public.

My commission expires January 11, 1908.

99 (Endorsed as follows.)

Stanford Berryhill
Deed
to
D. A. McDougal

NE/4 of NW/4 of Sec 18 &
SW/4 of NW/4 of Sec 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec 13 all in Twp 17 N
R 12 E.

Indian Territory, Western District, At Sapulpa, Ind. Ter.

I hereby certify that this instrument was filed for record in my office on Aug 23 1907 at 5 o'clock P. M., and is duly recorded in Record 24 page 492.

(Seal)

100 O. M. IRELAN,
Deputy Clerk & Ex-Officio Recorder.

Exhibit "O".

Know all Men by These Presents: That I, Columbus Berryhill of Stone Bluff, Western District, Indian Territory, for and in consideration of the sum of one hundred Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following

described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest quarter of the Northeast Quarter, and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

With all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the afore granted premises to the said D. A. McDougal, his heirs and assigns forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the afore granted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I, Emma Berryhill, wife of the said Columbus Berryhill, do hereby release and quitclaim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

In witness whereof, we the said Columbus Berryhill and wife Emma Berryhill, have hereunto set our hands and seals this the 21st day of August, 1907.

(Seal) COLUMBUS BERRYHILL.
(Seal) EMMA BERRYHILL.

United States of America,
Western District, Indian Territory.

On this 21st day of August 1907, before me E. E. Riley, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Columbus Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Emma Berryhill, wife of the said Columbus Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of

her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Stone Bluff, in said district and territory on the 21st day of August, 1907.

(Seal)

E. E. RILEY,
Notary Public.

My commission expires June 18, 1908.

101 (Endorsed as follows)

Columbus Berryhill & wife
Deed
to
D. A. McDougal

NE/4 of NW/4 of Sec 18 &
SW/4 of NW/4 of Sec 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec 13 all in Twp 17 N
R 12 E.

Indian Territory, Western District, At Sapulpa, Ind. Ter.

I hereby certify that this instrument was filed for record in my office on Sept. 3, 1907 at 3 o'clock P. M., and is duly recorded in Record 24 page 525.

(Seal)

O. M. IRELAN,
Deputy Clerk & Ex-Officio Recorder.

102 Exhibit "P".

Know All Men By These Presents: That I, Theodore Berryhill, of Sapulpa, Western District, Indian Territory, for and in consideration of the sum of One Hundred ($100) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest quarter of the Northeast quarter, and the Southwest quarter

of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

with all the improvements, privileges and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the afore granted premises to the said D. A. McDougal, his heirs and assigns, forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And, for the consideration aforesaid and for divers other good and valuable considerations, I Rilla Belle Berryhill wife of the said Theodore Berryhill, do hereby release and quitclaim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

In witness whereof, we the said Theodore Berryhill and wife, Rilla Belle Berryhill, have hereunto set our hands and seals this the 16 day of August, 1907.

(Seal) THEODORE BERRYHILL,
(Seal) RILLA BELLE BERRYHILL.

United States of America,
Western District,
Indian Territory.

On this 16th day of August, 1907, before me, R. C. Kinnaird, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Theodore Berryhill to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Rilla Belle Berryhill, wife of the said Theodore Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public in Sapulpa in said district and territory on the 16th day of August, 1907.

R. C. KINNAIRD,
(Seal) Notary Public.

My Commission expires June 22, 1909.

103 (endorsed as follows).

Theodore Berryhill,
Deed.
to
D. A. McDougal.

NE/4 of NW/4 of Sec 18 &
SW/4 of NW/4 of Sec 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec. 13 all in Twp 17 N
R 12 E.

Indian Territory, Western District, At Sapulpa, Ind. Ter.

I hereby certify that this instrument was filed for record in my office on Aug. 23, 1907, at 5 o'clock P. M. and is duly recorded in Record 24 page 494.
(Seal)

O. M. IRELAN,
Deputy Clerk & Ex-officio Recorder.

104 Exhibit "Q".

Know All Men By These Presents: That I, William Berryhill of Sapulpa, Western District, Indian Territory, for and in consideration of the sum of One Hundred ($100.00) Dollars, cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all my right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest quarter of the Northeast quarter, and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased.

with all the improvements, privileges and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the afore granted premises to the said D. A. McDougal, his heirs and assigns, forever. And I covenant with the said D. A. McDougal that I will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by me, but no further or otherwise.

And for the considerations aforesaid and for divers other good and valuable considerations, I, Alice Berryhill, wife of the said William Berryhill do hereby release and quitclaim unto the said D. A. McDougal, his heirs and assigns, all my right, claim or possibility of dower in or to the aforegranted premises.

In witness whereof, we the said William Berryhill and wife Alice Berryhill, have hereunto set our hands and seals this the 16th day of August, 1907.

(Seal) his WILLIAM X BERRYHILL, mark

(Seal) ALICE BERRYHILL.

Witness:
R. C. Kinnaird,
Joe Self.

United States of America,
Western District,
Indian Territory.

On this 16th day of August 1907, before me R. C. Kinniard, a Notary Public, within and for the Western District of the Indian Territory, appeared in person William Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me Alice Berryhill, wife of the said William Berryhill, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will signed the relinquishment of dower therein expressed, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public at Sapulpa I. T., in said district and territory on the 16th day of August, 1907.

R. C. KINNAIRD,
(Seal) Notary Public.

My Commission expires June 22, 1909.

105

(endorsed as follows:)

William Berryhill
Deed
to
D. A. McDougal

NE/4 of NW/4 of Sec 18 &
SW/4 of NW/4 of Sec 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec 13 all in Twp 17 N
R 12 E.

Indian Territory, Western District, At Sapulpa, Ind. Ter.

I hereby certify that this instrument was filed for record in my office on Aug. 23 1907 at 5 o'clock P. M., and is duly recorded in Record 24 page 496.
(Seal)

O. M. IRELAN,
Deputy Clerk & Ex-Officio Recorder.

106

Exhibit "R".

Know All Men By These Presents: That We, Mary Kiefer and Charlie Kiefer, her husband, of Sapulpa, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100) Dollars cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all our right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East hald of the Northwest quarter of the Northeast quarter, and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased,

with all the improvements, priviliges and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against

the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In Witness Whereof, we the said Mary Kiefer and husband, Charlie Kiefer, have hereunto set our hands and seals this the 16th day of August, 1907.

(Seal) MARY KIEFER,
his
(Seal) CHARLIE X KIEFER.
mark

Witness:
R. C. Kinnaird
Mary Kiefer

United States of America,
Western District, Indian Territory.

On this 16th day of August, 1907, before me, ..., a Notary Public, within and for the Western District of the Indian Territory, appeared in person Charlie Kiefer, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same, for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Mary Kiefer, wife to the said Charlie Kiefer, to me well known to be the person whose name appears upon the within and foregoing deed, and in the absence of her said husband declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In Testimony Whereof, I have hereunto set my hand as such Notary Public at Sapulpa, I. T., in said district and territory, on the 16th day of August, 1907.

R. C. KINNAIRD,
Notary Public.

My commission expires June 22, 1909.
(Seal)

107 (endorsed as follows:)

Mary Kiefer & Charlie Kiefer
Deed
to
D. A. McDougal

NE/4 of NW/4 of Sec 18 &
SW/4 of NW/4 of Sec 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec 13 all in Twp 17 N
R 12 E.

Indian Territory, Western District, At Sapulpa, Ind. Ter.

I hereby certify that this instrument was filed for record in my office on Aug. 23 1907 at 5 o'clock P. M., and is duly recorded in Record 24 page 501.

(Seal)

O. M. IRELAN,
Deputy Clerk & Ex-Officio Recorder.

108 Exhibit "S".

Know All Men By These Presents: That We, Mrs. Josie Morton and Thomas Morton, her husband, of Balld Hill, Western District, Indian Territory, for and in consideration of the sum of One Hundred Dollars ($100) Dollars cash in hand paid, the receipt of which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all our right, title claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast quarter of the Northwest quarter of Section 18, Township 17 North, Range 12 East, and the Southwest quarter of the Northwest quarter of Section 6, Township 17 North, Range 12 East, and the East hald of the Northwest quarter of the Northeast quarter, and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased,

with all the improvements, priviliges and appurtenances thereunto belonging or in anywise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but no further or otherwise.

In witness whereof, we the said Josie Morton and husband, Thomas Morton, have hereunto set our hands and seals this the 20th day of August, 1907.

JOSIE MORTON, (Seal)
his mark.

Witness to mark: THOMAS x MORTON. (Seal)
E. E. Riley,
W. S. McCray.

United States of America,
Western District,
Indian Territory.

On this 20th day of August, 1907, before me, E. E. Riley, a Notary Public, within and for the Western District of the Indian Territory, appeared in person Thomas Morton, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as one of the parties grantor, and stated that he had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day voluntarily appeared before me, Josie Morton, wife to the said Thomas Morton, to me well known to be the person whose name appears upon the within and foregoing deed, and, in the absence of her said husband, declared that she had of her own free will executed the same, for the purposes therein contained and set forth, without compulsion or undue influence of her said husband.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Morris, in said district and territory, on the 20th day of August, 1907.

(Seal)

E. E. RILEY,
Notary Public.

My commission expires June 18, 1908.

109 (Endorsed as follows:)

Mrs. Josie Morton and Husband, Thomas Morton,
Deed
to
D. A. McDougal.

NE/4 of NW/4 of Sec 18 &
SW/4 of NW/4 of Sec 6 &
E/2 of NW/4 of NE/4 &
SW/4 of NW/4 of NE/4 of
Sec 13 all in Twp 17 N
R 12 E.

Indian Territory, Western District, At Sapulpa, Ind Ter.

I hereby certify that this instrument was filed for record in my office on Aug. 23, 1907, at 5 o'clock P. M., and is duly recorded in Record 24, page 500.

(Seal)

O. M. IRELAN,
Deputy Clerk & Ex Officio Recorder.

110

Exhibit "T".

Contract.

An agreement made and entered into this 21 day of October, 1907, by and between D. A. McDougal and wife Myrtle A. McDougal, of Sapulpa, Indian Territory, parties of the first part, and the Kiefer Oil & Gas Company, a corporation organized under the laws in force in the Indian Territory, with its principal place of business at Kiefer, Indian Territory, party of the second part,

Witnesseth, That the said parties of the first part for and in consideration of the sum of One Dollar to them in hand paid by the party of the second part, receipt of which is hereby acknowledged, and the further consideration provided for in a separate instrument of writing and the covenants and agreements hereinafter contained on the part of the party of the second part to be paid, kept and performed, hereby grant, demise, lease and let unto the party of the second part, its successors and assigns, for the sole and only purpose of mining and operating for oil and gas and laying pipe lines, steam, water, gas and shackle lines, and of building tanks, stations, structures and necessary improvements thereon to take care of the said products, with the right of going in, upon, over and across said land for the purpose of operating the same, or any part thereof, all of the following described tract of land situated in the Creek Nation within the Western District of the Indian Territory, to-wit:

Northeast Quarter of the Northwest Quarter, of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East, containing forty (40) acres, more or less.

The parties of the first part do not claim to own or hold any further right and title in the said estate than the fee subject to a life estate in the father or father and mother of Andrew J. Berryhill, deceased, said life estate now being in Ed-
111 ward and Perry McKay, and this lease and contract is intended to confer no other or further rights or privileges than the owner of the remainder or fee can grant to a third party for the purpose of operating for oil and gas, subject to such grant of the right and privilege from the owners of the life estate which has been heretofore obtained by said Kiefer Oil and Gas Company through mean assignments of a lease executed by Edward and Perry McKay, with their wives joining therein, upon October 12, 1906, to Arthur B. Reese, of Independence, Kansas.

The purpose of this instrument and contract is simply to, for a valuable consideration, grant to the said Kiefer Oil & Gas Company the right to take said oil and gas or such quantities as they may discover and capture by exploration through the surface of the land into the said minerals, and the said parties of the first part, for a valuable consideration, hereby waive all rights to question the right and privilege of the Kiefer Oil & Gas Company to take said minerals for a term of fifteen (15) years, beginning with October 12, 1906, and as long thereafter as oil and gas, or either of them is produced from said land by the said Kiefer Oil & Gas Company, its successors or assigns, in paying quantities.

The consideration for this contract shall be no part or parcel of the consideration mentioned and set forth in the lease executed on October 12, 1906, by Edward and Perry McKay, their wives joining therein, to Arthur B. Reese, and now owned by the Kiefer Oil & Gas Company through various assignments.

The consideration for this lease or contract, and the grant of the privileges conferred, shall not be treated as income from the said land, but shall be treated in the nature of purchase money for the privileges herein conferred.

In consideration of the premises, the said party of the second part, Kiefer Oil & Gas Company, its successors and
112 assigns, agree to deliver to the credit of D. A. McDougal, his heirs or assigns, free of all cost, in pipe line or in tanks on the premises, a one-fifth (1/5) part of all oil produced and saved from the premises, and to pay to the said D. A. McDougal, his heirs or assigns, One Hundred Dollars ($100.00) per well for the gas from each and every well drilled on said premises, the product from which is marketable and sold off the premises, said payment to be made on each well within sixty (60) days after commencing to use the gas therefrom as aforesaid, and to be paid yearly thereafter while the gas from said well is used.

The party of the second part shall have the privilege, instead of delivering said McDougal's one-fifth (1/5) part in the pipe line or in tanks on the premises, of paying the said McDougal a sum of money equivalent to the value of said oil. Said value of the one-fifth (1/5) part of the oil produced from the premises for said D. A. McDougal shall constitute a lien on such improvements as party of the second part, its successors or assigns, may place on the premises.

The party of the second part agrees and binds itself, its successors and its assigns to commence immediate development

of the said land for oil and gas purposes, and to continue such development with all due diligence and sink such wells for oil as will be reasonably necessary to protect the land from drainage through wells on adjoining property. And the party of the second part hereby agrees to put down two wells on said land in addition to the one now on it, within 60 days from this date, and one other well within 90 days from this date.

If the party of the second part, its successors or assigns, shall fail to develop said property for oil and gas purposes, and prosecute with due diligence such exploration and development, within a reasonable time, then this contract shall
113 become null and void and of no effect upon ten days notice given by said D. A. McDougal to the Kiefer Oil & Gas Company, or its successors or assigns, that said D. A. McDougal withdraws from said contract and rescinds the same. In the event said lease is forfeited or rescinded as above stated, all rights and privileges in and to the oil and gas within the land now owned by said D. A. McDougal shall revert to him, his heirs and assigns. I, Myrtle D. McDougal, for the above consideration named waive and relinquish all dower and homestead right to said land to party of the 2nd part.

Witness our hands and signatures this 21st day of October, 1907.

(Signed) D. A. McDOUGAL,
MYRTLE A. McDOUGAL,
Parties of the first part.

Witness the official signature and seal of the party of the second part, on this 26th day of October, 1907.

KIEFER OIL & GAS COMPANY:
By Josiah G. Davis, President.

(Seal of Kiefer Oil
(and Gas Company)
Attest: Albert P. Crawford, Secretary.

Acknowledgement.

United States of America,
Indian Territory,
Western District—ss.

On this day came before me, a Notary Public within and for the said District, duly commissioned and acting, Josiah G. Davis, to me personally well known, and made oath that he is the President of the Kiefer Oil and Gas Company, and that he had signed the foregoing lease contract and had caused the seal of said Company to be attached to said contract by order of the Board of Directors of said Company, and that the seal thereto attached is the genuine seal of said Company;

and also came Albert P. Crawford, Secretary, to me well, known and made oath that he is the Secretary of said Company, that he attached the seal of said Company to said contract by order of the President and Board of Directors. And both said Josiah G. Davis, and Albert P. Crawford acknowledged that they had executed said deed for the purposes and considerations therein mentioned and set forth.

In Testimony Whereof, I have hereunto set my hand and seal as such Notary Public, in said district and territory on the 26th day of October, A. D. 1907.

My commission expires 11/1/1910.

JOSEPH BRUNER,
Notary Public.

Acknowledgement.

114 State of Missouri,
Jackson County—ss.

Be It Remembered, That on this day came before me the undersigned, a Notary Public within and for the State and County aforesaid, duly commissioned and acting, D. A. McDougal and Myrtle A. McDougal, husband and wife, to me personally well known as the grantors in the foregoing deed, and stated that they had executed the same for the considerations and purposes therein mentioned and set forth.

And on the same day also voluntarily appeared before me the said Myrtle A. McDougal, wife of the said D. A. McDougal, to me well knwon, and in the absence of her said husband declared that she had of her own free will signed and sealed the relinquishment of dower in the foregoing deed, for the purpose therein mentioned and set forth, without compulsion or undue influence of her said husband.

Witness my hand and seal as such Notary Public this 21st day of October, 1907.

(Signed) JAMES YOUNG,
Notary Public.

My Commission expires April 2nd, 1908.

115 Exhibit "U."

This agreement, made and entered into this 28th day of October, 1907, by and between Edmond McKay and Perry McKay, of Haskell and Bixby, Indian Territory, parties of the first part, and the Kiefer Oil & Gas Co. a corporation organized under the laws in force in the Indian Territory, with its principal place of business at Sapulpa, Indian Territory, parties of the second part,

Witnesseth: That for and in consideration of the sum of Ten Dollars, cash in hand paid by the party of the second part to the parties of the first part, receipt whereof is hereby acknowledged, the parties of the first part doth hereby let, lease and demise to the party of the second part, its successors and assigns, for a term of fifteen years from Oct. 12, 1906, the following described land, being and lying within the Creek Nation in the Indian Territory, to-wit:

> North East Quarter of the North West Quarter of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East.

for the purpose of erecting tanks within which to store oil.

The party of the second part, its successors and assigns, shall have the exclusive right and privilege under this contract to select four tank-sites on the said land, each tank-site to include within its boundaries five acres, and the said second party, its successors and assigns, shall have the right to erect and maintain such oil tanks as said party of the second part its successors and assigns may desire to erect and maintain upon said four tank sites during the term of this contract, to-wit fifteen years from October 12, 1906, and the party of the second part, its successors and assigns shall have the exclusive right to select four tank sites, and erect and maintain oil tanks thereon, within which to store oil throughout the life time of this contract;

And the said party of the second part shall have the right to construct, maintain and operate such collateral lines of pipe and piping as may be necessary for the reasonable and convenient use of said tanks, or any of them, erected and
maintained upon said four tank-sites during the life of
116 this contract.

And the said party of the second part, its successors and assigns, shall have the right to connect such tanksites with the main pipe line of any pipe line company doing a pipe line business in the Indian Territory or the new State of Oklahoma, interstate or intrastate.

The consideration above mentioned, ten dollars, shall be payment for one tank-site for one year, and the party of the second part agrees and hereby binds itself to pay to the party of the first part, ten dollars for each tank-site hereafter selected under this contract, the ten dollars to be paid upon the selection of said tank-site, and on the first day of November each year thereafter during the continuance of such tank upon said tanksite; that is, party of the second part agrees to pay ten dollars for each year the tank is maintained upon said tanksite,

said payment to be upon the first day of November of each year. If four sites are selected, then party of the second part agrees to pay forty dollars per year during the continuance of tanks upon the respective sites selected, and if a less number, then the ten dollars for each one selected as above provided. Kiefer Oil and Gas Co. agrees to use any tanks erected by it under this contract for oil taken from said land, and it will not put oil in them from other lands.

The party of the second part, its successors and assigns, under this lease, shall have the right of possession at any and all times that may be necessary for effecting the purposes of this contract. It is agreed, however, by the parties hereto, that said tank sites shall be selected, and the tanks, pipe lines, piping and collateral pipe lines shall be erected and maintained in such a manner as will [leat] interfere with the use of the said land above described by the parties of the first part for agricultural purposes, or for such other purposes as said property may be used for.

It is also agreed that said tanksites shall be selected, and said tanks, pipes, pipe-lines and collateral pipe lines erected and maintained so as to interfere as little as practicable
117 with drilling operations on said land for oil and gas for any lessee of said land for such purposes.

Each tanksite selected by the party of the second part, its successors and assigns, with pipes, pipe lines, and collateral pipe lines appurtenant thereto and annexed thereto shall be a severable, divisible and assignable part of this contract, and all tanks and pipe lines placed upon said land by the party of the second part, its successors and assigns, shall be and remain personal property and may be removed by the party of the second part, its successors and assigns at any time within the life of this contract.

And it is further agreed by all parties to this contract that the oil and gas mining lease executed on October 12, 1906, by Edmond McKay and Perry McKay, with their wives joining therein, to Arthur B. Reese, of Independence, Kansas, and now owned by Kiefer Oil and Gas Company, by various assignments, shall be and the same is hereby [thatified] and confirmed in all respects, with all the terms and conditions therein contained, as fully and completely as if herein set out specifically, and the said Kiefer Oil and Gas Company agrees and binds itself, its successors and assigns under said oil and gas lease, as provided in said lease, "to deliver to the credit of the first parties, their heirs or assigns, free of cost, in pipe line to which they may connect with wells, the equal one-eighth part of all oil produced and saved from the leased premises," and to pay the royalty on the gas as therein provided.

This contract is made and entered into with full knowledge of the claim of D. A. McDougal that he is the owner of the remainder interest in the said land and of his claim that Edmond McKay and Perry McKay have only an estate during the lifetime of George Franklin Berryhill.

Witness our hands and seals this 28th day of October, 1907.

EDMOND McKAY,
PERRY McKAY,
Parties of the first part.

118 Kiefer Oil and Gas Company, party of the second part, has hereunto caused its official signature and seal to be thereto affixed this 29th day of October, 1907.

KIEFER OIL & GAS COMPANY,
By Josiah G. Davis,
President.

(Seal of Kiefer Oil and Gas Co.

Attest:

By Albert P. Crawford, Secretary.

United States of America,
Indian Territory,
Western District—ss.

Be It Remembered, that on this 28th day of October, 1907, personally came before me, the undersigned, a Notary Public, in and for the Western District of the Indian Territory, duly commissioned and acting as such, Edmond McKay and Perry McKay, to me personally well known as the persons who signed and executed the foregoing contract as the parties of the first part, and being by me duly sworn, on oath stated that they had executed the same for the consideration and purposes therein mentioned and set forth, and I hereby so certify.

Witness my hand and seal as such Notary Public, this 28th day of October, 1907.

L. J. ROACH, Notary Public.

My commission expires Feby. 21, 1909.

Acknowledgment.

United States of America,
Indian Territory,
Western District—ss.

On this day came before me, a Notary Public, within and for the said District, duly commissioned and acting, Josiah G. Davis, to me personally well known as one of parties signing corporate name and made oath that he is the President of Kiefer Oil and Gas Company, and that he had signed the foregoing

instrument and had caused the seal of said company to be attached to said instrument by order of the Board of Directors of said Company, and that the seal thereto attached is the genuine seal of said Company; and also came Albert P. Crawford, Secretary, to me well known as one of parties signing corporate name and made oath that he is the Secretary of said company, that he attached the seal of said company to said instrument by order of the President and Board of Directors. And both said Josiah G. Davis and Albert P. Crawford acknowledged that they and the said Kiefer Oil and Gas Company had executed said instrument for the purposes and considerations therein mentioned and set forth.

In Testimony Whereof, I have hereunto set my hand and seal as such Notary Public, in said District and Territory on the 30th day of October, A. D. 1907.

(Notarial Seal) E. B. HUGHES,
Notary Public.

My commission expires May 18, 1909.

119 Answer Indorsed,

No. 1 Equity. Albert W. Shulthis vs. Kiefer Oil & Gas Co et als. Joint and several Answer of Defendants. Filed Jan. 13, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist., Okla. West & Mellette, Gibson & Ramsey, Muskogee, Ind. Ter. Attorneys for Defs.

And afterwards, to-wit, on the 14th day of January, 1908, the same being a day of the regular January 1908, term of said Court, the complainant filed a motion herein, in words and figures as follows:

In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay and Kiefer Oil and Gas Company, Respondents.

And now comes the complainant and begs leave to file the following amendment to the bill heretofore filed on the 28th day of December A. D. 1907.

EDGAR A. DeMEULES,
C. L. THOMAS,
Solicitors for complainant.

In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay and Kiefer Oil and Gas Company, Respondents.

Now comes the complainant and by leave of court amends his bill in the following manner: After the word "complaint" on line fourteen of page seventeen of the bill insert the words "but not under oath" so that the request or prayer of the complainant numbered seven to said page seventeen shall be in words and figures as follows:

7. That the court grant to your orator your writ of subpoena directed to the Kiefer Oil and Gas Company, D. A. MacDougal, Perry McKay and Edmond McKay and to such others as shall in the discretion of the court appear necessary to the final hearing and determination of this cause, commanding them on a day certain to appear and answer under this bill of complaint, but not under oath; and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience;
120 and that your orator have such other and further relief to which in equity and good conscience, he may be entitled.

C. L. THOMAS,
EDGAR A. De MEULES,
Solicitors for complainant.

Motion Indorsed.

Equity No. 1. Albert W. Shulthis, Plaintiff, vs. D. A. MacDougal, et al Defendant. Motion to Amend Bill. Amendment of Bill. Filed Jan. 14, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Thomas & De Meules, Suite 7 Masonic Bldg., Muskogee, Ind. Ter. For Complainant.

And afterwards, to-wit, on January 14, 1908, an order was entered herein, which is in words and figures as follows:

121 In the United States Circuit Court for the Eastern District of the State of Oklahoma, Sitting at Muskogee, January Term, 1908.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendants.

Order Allowing Amendment to Complainant's Bill.

Now on this 14th day of January, 1908, comes C. L. Thomas and Edgar A. DeMeules, counsel for complainant, Albert W. Shulthis, and move the Court for leave to amend the prayer of their bill by inserting the words "but not under oath" after the word "complaint" in line 14 of page 17 of the bill, same being a part of the seventh section of the prayer, and it appearing that due notice of the motion has been given counsel for defendants, who appeared in court and resisted the motion, after due consideration of all of which the motion is allowed and the prayer of the complainant's bill, section 7, on said page 17 is allowed to be amended accordingly, and as amended, shall read as follows:

"7. That the court grant to your orator your writ of subpoena directed to the Kiefer Oil and Gas Company, D. A. MacDougal, Perry McKay and Edmond McKay and to such others as shall in the discretion of the court appear necessary to the hearing and final determination of this cause, commanding them on a day certain to appear and answer under this bill of complaint, but not under oath; and to abide and perform such order and decree in the premises as to the court shall seem proper and required by the principles of equity and good conscience; and that your orator have such other and further relief to which in equity and good conscience, he may be entitled."

122 The defendants except to the action of the court in allowing said motion to amend complainant's bill. The answer of the defendants under oath having been previously filed, it is ordered and ruled by the Court in allowing the above amendment that the complainant be and is hereby denied the benefit of said answer as an answer under oath, and it is ordered that the answer of defendants now on file be and the same is hereby treated as the defendants' answer to the complainant's bill as thus amended.

Made and entered on this 14th day of January, 1908.

RALPH E. CAMPBELL,
Sitting as United States Circuit Judge.

Order Indorsed: No. 1 Eq. Albert W. Shulthis Comp. vs. DL. A. McDougal, Perry McKay, Edmond McKay & The Kiefer Oil & Gas Co. Defts. Order allowing amendment to Complainant's Bill. Filed Jan. 14, 1908. L. G. Disney, U. S. Circuit Clerk, Eastern Dist. Okla. Gibson & Ramsey Muskogee, Ind. Ter. Attorneys for Defts.

And thereafter, to-wit, on January 14, 1908, the same being a day of the regular January 1908 term of said Court,

the Complainant files his replication herein, which is in words and figures as follows:

123 In the United Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. MacDougal, Edmund McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendants.

Replication.

And now comes Albert W. Shulthis, complainant in the above cause, and replying to the answer filed herein says that, saving and reserving all manner of exceptions to the insufficiency of the answer, for replication thereto doth say that his bill is true and sufficient as averred, and that he is ready to prove it, and that the answer of the defendants and each of them is untrue and insufficient.

Wherefore, he prays relief as set forth in his original bill.

C. L. THOMAS,
EDGAR A. DeMEULES, Solicitors.

Replication Indorsed: Equity No. 1. Albert W. Shulthis Plaintiff vs. D. A. MacDougal, et al. Defendant. Replication Filed Jan. 14, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Thomas & DeMeules, Suite 7, Masonic Bldg., Muskogee Ind. Ter. for Complainant.

124 And thereafter, to-wit, on the 15th day of January, 1908, the same being a day of the regular January 1908 term of said Court, a stipulation of counsel for the parties hereto was filed herein, which is in words and figures as follows:

125 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee,

January Term, 1908.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendants.

Stipulation of Counsel for the Taking of Evidence.

It being the desire of counsel for all parties in this cause to hasten the hearing of this case upon the merits, the issues hav-

ing been made up, it is agreed that the Court appoint Giles A. Penick, as special examiner, to take all the evidence in this case offered by both parties and report the same over his certificate to this Court by filing all depositions and documentary evidence with the Clerk of this Court on or before the 18th day of February, 1908.

It is agreed that the testimony of the witnesses shall be produced orally before said examiner, the witnesses sworn
126 by him and their testimony taken in shorthand by some stenographer or himself and reduced to writing, and the whole, with such documentary evidence as offered, be filed by the examiner with the Clerk of this Court on or before the above said date over his certificate that the same is the testimony of the various witnesses reduced to writing, with attached thereto the documentary evidence introduced by the parties.

The signature of the witnesses to their respective depositions or testimony is waived and it is agreed that the evidence thus taken, when filed with the Clerk, shall become part of the record in this cause, and heard by the Court on the trial of this case, subject to such objections and exceptions as to competency, relevancy and admissibility as the parties may desire to make.

This January 14th, 1908.

C. L. THOMAS,
EDGAR A. DeMEULES,
Counsel for Complainant.

P. C. WEST,
WM. MELLETTE,
N. A. GIBSON &
GEO. S. RAMSEY,
Counsel for Defendants.

Stipulation indorsed: No. 1 Equity Albert W. Shulthis, Complainant vs. D. A. Mac Dougal, Edmond McKay, Perry McKay & Kiefer Oil & Gas Co. Defendants. Stipulation of Counsel. Filed Jan 15 1908 L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Gibson & Ramsey Muskogee, Ind. Ter. Attorneys for Defendants.

127 And thereafter, to-wit, on January 15, 1908, the same being a day of the regular January, 1908 term of said Court, an order of Court was entered and filed herein, which is in words and figures as follows:

128 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, sitting at Muskogee, January Term, 1908.

Albert W. Shulthis, Complainant,
No. 1 vs. Equity.
D. A. MacDougal, Edmond McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendants.

Order of Court.

Counsel for all parties having agreed in writing, as shown by stipulation on file, that the evidence in this case be produced orally and taken by an examiner, the Court appoints Giles A. Penick, examiner, and said Giles A. Penick having been duly sworn as such examiner, is hereby authorized and directed to take the testimony of all such witnesses as respective parties may desire to offer, and it is ordered that said examiner reduce the testimony of the witnesses to writing as per stipulation of the counsel on file, report the same to this Court with all such documentary evidence as the par-
129 ties may offer, including any agreed statement of facts. said examiner to report same to this Court on or before the 18th day of February, 1908, by filing the evidence as taken by him and submitted to him, over his certificate, with the Clerk of this Court.

Made this 15th day of January, 1908, by the Honorable Ralph E. Campbell, Presiding as United States Circuit Judge in and for the Eastern District of the State of Oklahoma.

RALPH E. CAMPBELL, Judge.

Order of Court Indorsed: No. 1 Equity. Albert W. Shulthis, Complainant, vs. D. A. McDougal, et al., Defendants. Order of Court appointing special examiner. Filed Jan. 15, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Gibson & Ramsey, Muskogee, Ind. Ter., Attorneys for—

130 And thereafter, to-wit, on the 18th day of February, 1908, Giles A. Penick, the special examiner appointed by the order of said Court, entered herein on January 15, 1908, filed his report with the Clerk of this Court; which said report includes the testimony of witnesses reduced to writing, agreed statement of facts, stipulation, and exhibits to the proof and to the agreed statement of facts. Said report is in words and figures as follows:

131 In the United States Circuit Court for the Eastern District of Oklahoma, Muskogee.

Albert W. Shulthis, Complainant,
No. 1 vs. Equity.
Kiefer Oil & Gas Company, D. A. McDougal, Edmond McKay and Perry McKay, Defendants.

Transcript of Testimony.

Muskogee, Oklahoma, February 3, 1908. Testimony taken before Giles A. Penick, Special Examiner, at the Offices of Thomas & Demeules, the complainants appearing by Thomas & Demeules, his attorneys, and the defendants, by George S. Ramsey and Preston C. West, their attorneys.

Albert W. Shulthis, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Thomas:

Q. State your name, age, and place of residence.

A. Albert W. Shulthis; age, 45; residence, Independence, Kansas.

Q. Have you been sworn as a witness in this case?

A. I have.

Q. What is your occupation?

A. I am engaged in the banking business.

Q. Any other occupation? A. Oil and gas business.

Q. Are you the Albert W. Shulthis who is named as complainant in this case? A. I am.

Q. Are you the Albert W. Shulthis who is named in a certain oil and gas mining lease—named as lessee—in a certain oil and gas mining lease executed on March 24th, 1906, by George F. Berryhill and Clementine Berryhill, to cover Lot 5 of Section 6, and the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East, of the Indian Base Meridian?

A. I am.

Q. State what, if any, consideration, other than the covenants and agreements and the royalties reserved in said lease, was paid to the lessors in said lease for the execution and delivery of the same? A. One hundred dollars.

132 Q. State whether or not you paid that one hundred dollars? A. Yes sir.

Q. State whether or not that one hundred dollars, or any part thereof, has at any time since the execution and delivery of said lease been paid back to you, or anyone for you, or tendered to you or any one for you? A. They have not.

Q. State whether or not any of the defendants in this

case have at any time offered to pay back to you the said one hundred dollars or any part thereof? A. They have not.

Q. How long have you been engaged in the oil and gas business? A. About fifteen years.

Q. State in what localities?

A. In Kansas and Oklahoma.

Q. How long have you been engaged in the oil and gas business in the State of Oklahoma, or what was the Indian Territory? A. Six or seven years.

Q. In what parts of that Territory which was formerly the Indian Territory?

A. At first in the Osage Nation; since 1904, I have been interested in the Cherokee Nation.

Q. Any other parts?

A. And later on, in the Creek Nation.

Q. How long have you been engaged in the oil and gas business in the Creek Nation?

A. The latter part of 1905, or the early part of 1906.

Q. State whether or not you are familiar and acquainted with the oil and gas development in the Creek Nation?

A. Yes sir.

Q. Are you or are you not?

A. Yes, I have kept up with the operations from the time the first well was drilled.

Q. State whether or not you are familiar and acquainted with the location of the oil fields known as the Glenn field?

A. Yes sir, I think I am.

Q. State whether or not in the month of October, 1906, you were familiar and acquainted with the present oil territory in what is known as the Glenn field?

A. Yes sir, I think I was.

Q. What township and range is the Glenn field in?

A. Seventeen, twelve.

Q. Township and Range? A. Township 17, Range 12.

Q. Township 17 North? A. North.

Q. And Range 12 East? A. Range 12 East.

Q. State whether or not the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East, in the Creek Nation, was at that time—that is, in the month of October, 1906, regarded as proven oil territory?

Mr. Ramsey: I object to what it was regarded as.

A. Well, that might have been considered proven oil territory; it had the appearance at that time of being within the bounds of the oil belt, as there was some development in Section 7, which was just a little northeast of Section 18.

Q. Is your answer, then, to the foregoing question, based

on your judgment of the value for oil and gas for that piece of land? A. Yes sir, I considered that.

Q. At the time you took the lease on the above described land, was or was not one hundred dillars a fair price for that lease, as a bonus?

A. Yes, indeed, it was quite a liberal price for that time.

Q. Was or was there not any change in the situation in the Glenn field, so as to increase or decrease the value of that piece of land for oil and gas purposes between March 21, 1906, and October 12, 1906?

A. Yes, indeed, the well coming in from the center of Section 8 proved an extension west of the original Glenn pool, which would naturally increase the value of the land in that vicinity.

133 Q. State whether or not you have had any experience with the taking of oil and gas leases in the Creek Nation.

A. Yes sir.

Q. You have had some?

A. I have had quite a little experience.

Q. When did you first become interested in leases in the Creek Nation?

A. I think in 1906, the early part of 1906.

Q. On what form were most of your leases taken?

A. The regular Departmental leases.

Q. What disposition was made of your leases when they were executed and taken?

Mr. Ramsey: I object to that, because it is immaterial and has nothing to do with the law suit or any issues in the case.

A. They were filed with the Indian Agent as quickly as possible after the execution.

Q. Why did you file them with the Indian Agent?

A. To protect myself against any other lease that might be given by the Indian.

Q. Are you advised of the—are you or are you not advised of the general contents and substance of the rules and regulations of the Secretary of the Interior relative to the taking, filing, and perfecting of oil and gas leases on the lands of citizens of the Creek Nation?

A. Yes sir, it became very necessary for a man to become acquainted with the regulations, if he intended taking any leases in either the Creek or Cherokee Nation.

Q. When did you first become advised of the rules and regulations of the Secretary of the Interior? A. In 1904.

Q. State whether or not you are pretty generally acquainted with the oil men operating in Indian Territory.

A. I am acquainted with the—a great many of them, yes sir.

Q. State if you know whether or not the substance and con-

tents of the rules and regulations prescribed by the Secretary of the Interior, for the taking, filing, and approving of oil and gas mining leases on the land of citizens of the Cherokee and Creek Nations were generally known among the oil men of your acquaintance.

A. Yes sir, I think they were informed about as quick as the regulations were issued.

Q. State if you know whether the Secretary's regulations have been a subject of very much discussion among oil men in Indian Territory, say in the past two years.

A. Yes sir, they have been discussed quite freely amongst the oil men.

Q. State whether or not the substance of the rules and regulations of the Secretary of the Interior, regarding the taking, filing and perfecting of oil and gas leases in the Creek Nation in Indian Territory were a matter of common knowledge among the operators for the past two years.

A. Yes, I think they were; they couldn't do business without becoming acquainted with them.

Q. State whether or not you filed or had filed under your direction all the papers in connection with the oil and gas lease first above mentioned, so as to comply with the rules and regulations of the Secretary of the Interior?

A. Yes sir, they were all filed as asked for by the Department.

Q. The endorsements on the oil and gas lease—on that oil and gas lease as evidenced by exhibit one to complainant's Bill herein, shows that the said lease was approved on April 19th, 1907. What explanation have you for the delay and lapse of time between the taking and execution of this lease and the approval?

A. The Department called for proof of heirship in the matter, which Mr. Berryhill refused to make; I afterwards sent down, twice again, and finally the matter was
134 brought up before an Inspector at Tulsa, where the evidence was secured, and as soon as this was done, the lease went forward and was promptly approved.

Q. State whether or not you used all reasonable and due dilligence, from the time the lease was taken and executed, to fulfill all requirements of the Secretary of the Interior necessary to have this lease approved? A. Yes sir.

Q. What, if anything, did you do after the approval of the lease to fulfill the covenances and stipulations contained in the lease?

A. I tried to get possession of it, so that I could commence my operations, but found the Keifer Oil & Gas Company in

possession with a guard, who refused to permit me entrance upon the property.

Q. State whether or not you are now at all times ready, willing, and able, to, in all respects—ready to fulfill all the covenants and stipulations contained in the lease?

A. Yes sir, I am.

Q. How long have you been a resident of the State of Kansas? A. Since 1876.

Q. Have you been a resident of the State of Kansas continually since that time, up to the present date?

A. Yes sir.

Q. State whether or not you are the owner of and have the exclusive right to all deposits of oil and natural gas in or under the above-described land, with the further right to enter on said land and to prospect for, extract, pipe, store, refine, and remove such oil and natural gas, and to occupy and use so much of the surface of said land as may be reasonably necessary to carry on the work of prospecting for and extracting, piping and storing, refining and removing such oil and gas, including also the right to obtain from wells, or other sources on said land, by means of pipe lines or otherwise, sufficient supply of water to carry on such observations, save and except the royalty right—royalty reserved in the lease, heretofore described?

A. I have.

Q. You are the owner—or, are you not, as therein specified?

A. Why, I am the owner.

Mr. Ramsey: The defendants object to that question, and move to strike out the answer, because it is calling for the opinion of the witness on matters of law, and asking for his judgment on all the issues in the case, and a procedure never heard of in any court of this country or any other.

Q. What is the value of your lease on the above-described land?

Mr. Ramsey: Object to that for the reason that it has not been determined that he has got any lease of any value. The witness can testify as to the value of gas and oil rights in the lands, but cannot testify as to the value of the lease; object to the question for these reasons.

A. I consider the value of the lease at about a hundred thousand dollars.

Q. What is the value of a good and perfect lease on the above-described land?

A. I should say that a hundred thousand dollars was a fair value.

Q. Are you acquainted and familiar with the oil and gas

development on the lands immediately adjacent to the above-described lands? A. Partially, yes.

135 Q. State briefly what developments now exist on the lands immediately adjacent to the lands in controversy in this cause.

A. There are three large wells on the north and three large wells on the east; I am not informed as to the wells on the south or west.

Q. State whether or not the wells on the east and north of the lands in controversy drain and will drain the oil out from under the land covered by your lease and in controversy in this case.

A. They certainly will. That is a matter that has been proven to the satisfaction of all experienced oil men and especially so in the Glenn sand, which is a soft, prolific sand.

Q. Do you know whether or not the Kiefer Oil & Gas Co. has disposed of any oil produced from the lands involved in this controversy?

A. I know that they are removing the oil from the land described in the above lease.

Q. Have you any means of knowing the amount that they are so removing? A. I have not.

Q. Have you any means of tracing and identifying the oil or the amount of oil that they have removed or may remove from the above described land? A. No sir, I have not.

Q. Do you know what assets if any the Kiefer Gas and Oil Co. has, other than its interest in any lease on this land?

A. I do not.

Q. State what damage, if any, you have suffered by reason of being kept out of the possession of the above-described lands under your lease, and, as far as you are able, what damages you have suffered, if any, by reason of the Keifer Oil & Gas Co. removing oil produced from these lands.

Mr. Ramsey: Defendant objects to that question for the reason that it calls for a conclusion of the witness as to damages.

A. I have never made an estimate that is, a careful estimate of what I considered the damage done up to this time, but if I had been able to have possession of this property, I should have drilled wells thereon, several months since, and avoided the drainage which has been going on for the past several months, which is naturally produced by the adjoining well owners; the fact is, it was rumored—

Mr. Ramsey: You need not tell what was rumored.

Q. Can you or can you not measure the exact amount of damage which you have suffered?

A. No, it would be only an estimate.
Q. What is your estimate?

Mr. Ramsey: I object to that for the reason that it expresses his opinion; no figures given.

Mr. Thomas: I withdraw that question.

Cross Examination

By Mr. Ramsey:

Q. Do you know George Franklin Berryhill?
A. Yes sir.
136 Q. How long have you known him?
A. Let me see; when I was down here the last time I come; if you remember when we were down here before—that was the day.
Q. Sometime in July 1907?
A. Yes sir, about July 1907.
Q. That was the first time you had any personal acquaintance with George Franklin Berryhill? A. Yes sir.
Q. Do you know Clementine Berryhill? A. No sir.
Q. You didn't negotiate for the lease from George Franklin Berryhill and Clementine Berryhill, that you claim the mineral rights to this property under—you didn't negotiate in person for that lease? A. No sir.
Q. Who represented you in the taking of that lease?
A. John Chaney, at Sapulpa.
Q. You didn't pay George Franklin Berryhill and Clemintine Berryhill this hundred dollars, then, that you mention in your proof in chief?
A. I didn't pay them in person; my recollection now is that there was a check given for that amount, which I paid.
Q. If they were paid a hundred dollars, they were paid that hundred dollars by John Chaney, were they not?
A. Yes sir.
Q. So, what you know about the payment of that hundred dollars is what John Chaney reported to you?
A. Possibly, unless I had the original check which was paid.
Q. If there was a check given for it, it was given on you?
A. Well, Mr. Chaney frequently drew on me and also on our bank.
Q. Well, do you remember whether he drew on you in this case or not, for the hundred dollars?
A. Well, I am not positive about that, but it seems it—well, I am not positive about that.
Q. You don't know, then, how the hundred dollars was paid by Chaney to George Franklin Berryhill and Clemintine Berryhill, if it was paid? A. No sir.
Q. Then of your own knowledge you don't know that this

hundred dollars was paid to George Franklin Berryhill and Clemintine Berryhill.

A. Well, it has never been disputed.

Q. Well, the question is, do you know of your own knowledge that that hundred dollars was paid?

A. No, I can't say that I absolutely knew it of my own knowledge.

Q. All the information you have in regard to that hundred dollars is hearsay—what was reported to you? A. Yes.

Mr. Ramsey: Defendants counsel here object to all the original testimony of the witness in regard to the payment of the hundred dollars to George Franklin Berryhill and Clemintine Berryhill, and move to strike out all of his answers and affidavits on that line.

Q. Now, you say the proof of heirship in this case was made at Tulsa, Indian Territory, before the Inspector is that correct?

A. The necessary evidence, as I remember, was obtained at that time before the Inspector.

Q. Now, who was that Inspector? A. W. D. Ford.

Q. Were you present? A. No sir.

Q. Do you know when that was? A. No sir.

Q. What year?

A. Either the last of 1906 or the 1st—early part of 1907.

Q. To refresh your recollection, wasn't it sometime in March, 1907? A. I cannot say.

Q. Who obtained that proof of heirship for you?

A. Mr. Thomas.

137 Q. Was that proof of heirship in the nature of written affidavits written testimony [ot] evidence—or do you know, now, of your own knowledge?

A. I never saw it; it was reported to me by counsel.

Q. As far as the kind of proof to show the heirs of Andrew J. Berryhill, deceased,—the nature of it and form of it—is concerned or was concerned, all you know about it is hearsay?

A. Reported to me by counsel.

Q. At the time this lease was taken by your representative, Mr. Chaney, did he have authority from you to come down here and take the lease on this particular piece of land?

A. Yes sir.

Q. Where does Chaney live? A. Sapulpa:

Q. Didn't you instruct him by letter or was he in Independence or somewhere else and conferred with you and received instructions from you to go to George Franklin Berryhill and Clemintine Berryhill, and take a lease on this particular piece of land?

Mr. Thomas: We object to that as immaterial.

A. No sir, I sent Mr. McElwane down from Independence to give him a description of lines upon which I wanted some leases; in that certain district—the word "district" would be better than "lines".

Q. You sent Mr. McElwane down as your representative from Independence to take leases for you on lands in certain localities?

A. Yes sir. That is, Mr. McElwane was at Independence and also was running a plumbing shop in Sapulpa, and he was coming down, and I told him to tell Mr. Chaney to take all the leases he could get in a certain distance.

Q. You didn't send Mr. McElwane down there with instructions to take the lease from George Franklin Berryhill and Clemintine Berryhill?

A. No special lease was mentioned, only the lines I wanted leases.

Q. You just told him in a certain radius you would like to have leases? A. Yes sir.

Q. Without naming the parties? A. Yes sir.

Q. That is correct?

A. Yes sir, that is correct.

Q. This lease was filed in the Indian Agent's office according to the record on April 21st, 1906; where was that lease from the time that it was taken on March 24th, until filed on April 21st?

A. Well, a portion of the time it was in my office.

Q. How long a portion of the time?

A. Well, I cannot say. When the lease came to my hands, I discovered that there were several papers missing, and I endeavored to secure these and secured what I could and then filed the lease within the limit of the regulation of the Government.

Q. Those papers missing was the proof of heirship, was it?

A. It was the proof of heirship—it was the certificate, I think, from Pleasant—Chief Porter, and also the affidavit of the bonus; that is my recollection now.

Q. Now, did you get these before you filed the lease—supply that?

A. A portion of these papers were secured.

Q. And a portion were not secured until after the lease had been filed? A. Yes sir.

Q. Now, as a fact, you had to send your man to see George F. Berryhill eight or ten times before you could get him to sign any other papers, didn't you?

A. I sent him several times; three times that I remember of.

138 Q. When was the last time you sent him?

A. I cannot say just when the last time was.

Q. Well, about what time?

A. After I found that Mr. Chaney seemed to be unable to secure these papers, I sent W. H. Whitford, of Independence, and I think that he made two trips. One in July, and the other possibly in September, or October, of 1906.

Q. These trips made by Mr. W. H. Whitford were made in July 1906, September, 1906, and October 1906?

A. About that time.

Q. Now, before that time you had had Mr. Chaney trying to get these papers?

A. Mr. Chaney had promised to secure them and had various excuses for not being able to get them.

Q. Mr Chaney reported to you that he had been trying to get them, did he? A. Yes sir.

Q. And on account of his failure, you sent this other man?

A. Yes sir. I had a good deal of trouble with this lease. After Mr. Chaney couldn't get these proofs of heirship, I got an affidavit that about covered the ground, from some neighbor or some man that had lived on this piece of land; I don't remember just what time it was; and submitted it to Kelsey, and Mr. Kelsey thought it was not sufficient, so I had to get after it again.

Q. Now, you have taken a good many leases in the Indian Territory? A. Yes sir.

Q. I will ask you if it is not a fact that you had a good many of these leases taken in five duplicates?

A. No sir, I never did.

Q. Thomas & Demueles have been representing you for sometime, haven't they? A. Yes sir.

Q. Under their advice, haven't you had a great many of these leases recorded in the office of the United States Clerk, as Ex-officio Recorder?

A. I don't think that I ever did, unless it was possibly after this case came up.

Q. After this law suit here, then you began to file them in the Clerk's office?

A. Yes, I filed some of them.

Re-direct Examination

By Mr. DeMeules:

Q. Counsel for defendants in this case has referred to an affidavit of bonus in connection with your lease; I wish you would state what this affidavit of bonus was and what it contained, and under whose request or direction an affidavit of bonus was obtained.

Mr. Ramsey: Objected to by defendant on the ground that the affidavit is the best evidence of its contents.

A. I don't remember now.
Q. Don't remember what it contained?
A. No. Well, excepting the amount and date; one hundred dollars.

By Mr. Thomas:
Q. State whether or not C. L. Thomas and Edgar A. Demeules, or either of them, represented you in any manner whatsoever at the time or about the time of the execution and delivery of your lease on this land?
A. No sir, they did not.

139 Q. State whether or not you were ever advised to take a fifth copy of the lease up to the time of the execution and delivery of your lease on lands in controversy?

Mr. Ramsey: I object to that as incompetent and not admissible in this case.

A. No sir, I never was.

Witness dismissed.

Frank A. Gillespie, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Thomas:
Q. State your name, age, and place of residence.
A. Frank A. Gillespie; thirty-nine; Tulsa.
Q. Have you been [a] sworn as a witness in this case?
A. Yes, sir.
Q. What is your occupation, Mr. Gillespie?
A. Oil business.
Q. How long have you been engaged in the oil business?
A. 18 years.
Q. In what localities?
A. Pennsylvania, Kansas, and Indian Territory.
Q. What part of the Indian Territory have you been engaged in the oil business in?
A. Well, from the State line south to Okmulgee, I guess; Kansas line.
Q. In what Nations, under what was Indian Territory, have you been engaged in the oil business?
A. Well, in the Osage, Cherokee, and Creek.
Q. How long have you been engaged in oil business in the Creek Nation? A. Two years and a half.
Q. State whether or not you are acquainted with the oil field in the Creek Nation known as the Glenn [filed]. A. Yes sir.
Q. State whether or not in the month of October, 1906, you were familiar and acquainted with the limits of the present oil territory, in what is known as the Glenn field?

A. I was at the first find.

Q. Of the present territory? A. Yes sir.

Q. What township and range is the Glenn field in?

A. 17, 12.

Q. State whether or not the northeast quarter of the northwest quarter of section 18, township 17 north, range 12 east, was at that time—that is, in the month of October, 1906—known to be proven oil territory.

A. Well, it was not then, but had great possibility at that time; it afterwards proved to be good.

Q. State whether or not it was believed at that time that the above described land was within the limits of the oil bearing territory.

Mr. Ramsey: I object to what was believed; object to the question for that reason.

Q. Go ahead.

A. Well, as I said before, it was generally supposed it was, and it afterwards turned out it was; it had great possibilities.

140 Q. State whether or not there was any change in the value of that land as oil and gas land between March 24th, 1906, and October 12th, 1906?

A. Well, possibly a little; I can not remember, though, exactly as to that. I think it was, though; some little bit, probably.

Q. State whether or not you have had any experience in taking of oil and gas leases in the Creek Nation? A. Yes sir.

Q. State whether or not you were interested in any oil and gas leases in the Creek Nation? A. Yes sir.

Q. When did you first become interested in the leases on lands in the Creek Nation?

A. Sometime in '95; I don't remember the dates, though.

Q. In 1905? A. 1905, yes.

Q. State what experience you had in taking oil and gas leases on lands of citizens in the Creek Nation.

Mr. Ramsey: Defendants object to that for the reason that it is wholly incompetent, immaterial, and not germain to any of the issues in the case.

A. Well, the experience of taking them, we always took them under the rules of the Department of the Interior.

Q. On what form were most of your leases taken?

A. Well, the form prescribed by the Secretary of the Interior.

Q. When did you first hear of the rules and regulations of the Secretary of the Interior, relative to the taking of oil and gas leases in the Creek Nation?

A. Well, that was before I came down in there.

Mr. Ramsey: Wait a minute: Defendants object to when the witness first heard of the Secretary's rules, or whether he ever heard of them.

Q. Go ahead. A. Prior to 1905, sometime; I don't know.

Q. Are you acquainted with the substance of the contents of the rules and regulations of the Secretary of the Interior, relative to the taking, perfecting and filing of oil and gas leases on lands of the citizens of the Creek Nation? A. Yes sir.

Q. When did you first become acquainted with the substance of the contents of such rules and regulations?

A. Well, it was prior to 1905, when I came down here.

Q. State whether or not you are pretty generally acquainted with oil men operating in Indian Territory?

A. I know quite a few of them.

Q. State whether or not the Secretary's rules and regulations have been the subject of much discussion among the oil men during the past two years? A. Well, I think a whole lot.

Q. State whether or not the substance of the rules and regulations of the Secretary of the Interior, regarding the taking and filing of oil and gas leases in the Creek Nation, in Indian Territory, was a matter of common knowledge among oil operators of the Indian Territory?

A. Generally so, I should say; anybody taking leases.

Q. When you took any of your leases on the forms prescribed by the Secretary of the Interior, what disposition did you make of them?

Mr. Ramsey: I object to that for the reason that the individual action of this witness in regard to his own private business should not be admitted in evidence in this case to prove or disprove any of the issues.

141 Q. Go ahead.

A. As I understand that question, you want to know what I done when I took a lease, and what form I secured it—

Q. What you did.

A. Of course these leases were all put up to us by somebody in control of the Indian and we had the leases worked up and put on record in thirty days from the time we took it.

Q. Put on record where?

A. At Muskogee, in the Indian Agent's office; that was the law of the Secretary of the Interior.

Q. Was that the general mode of procedure and usage of the oil men in Indian Territory?

A. That was the only mode; couldn't take them any other way. Outside of filing them, if an operator wanted to run the risk, he was up against it; that is all.

Cross Examination

By Mr. Ramsey:

Q. You say you had them put on record at the Indian Agent's office? A. Filed at the Indian Agent's office.

Q. You didn't have them transcribed to any record in the office of the Indian Agent.

A. Well, I understood it was putting them on record. I don't know.

Q. How is that?

A. I understood it was putting them on record in the Indian Agent's office.

Q. All you understood was that you were required when you took a lease to file it with the Indian Agent, in order to reach the Secretary of the Interior, isn't that a fact?

A. I understood it was put on record there; I always went there to get information in regard to land leases.

Q. Did you ever see one so recorded there?

A. I don't know that I ever looked it up personally.

Q. You never saw a record in the Indian Agent's office, did you? A. I say I don't know that I ever looked it up myself.

Q. If you never looked it up, how do you know it was on record?

A. I supposed if a man sent a thing to be put on record, it went on.

Q. You are testifying on supposition?

A. No, I am testifying according to the rules and regulations of the Secretary as I understood.

Q. Can you point out any rule of the Secretary of the Interior, regarding leases taken on Departmental forms to be recorded in the office of the Indian Agent?

A. If it wasn't filed or recorded, you would lose your lease; I know that.

Q. All that was done was simply to file the lease?

A. Why, it was filed there to be put on record in the Indian Agent's office.

Q. You don't know whether it was put on record or not, do you?

A. Well, it was supposed it was; we were told to send it in there.

Q. All you know is that when you took a lease, they told you to send it in to the Indian Agent's office.

A. That was prescribed by the Secretary of the Interior in these rules.

Q. Whether they put it on record, you don't know?

A. I always found the leases there when I went to get it.

Q. Yes, but did you find any transcripts of that lease in the records of the Indian Agent's office when you went to get it?

A. I got the numbers of the lease, yes sir.

Q. The question is whether your lease was transcribed on to a record and whether you ever saw one transcribed to the record?

A. The only thing I know is they had the numbers of the lease there.

142 Q. That is all that you know, they gave you the numbers of the lease?

A. I could find out anything I wanted by asking for it.

Q. About your lease?

A. Yes sir, and several other leases I have asked about.

Q. The leases you asked about were ones you were interested in? A. Not altogether.

Q. Did you ever see any lease transcribed on any record?

A. Well, I asked there for leased land and they told me whether there was a lease on it or wasn't any lease on it.

Q. That is all they ever told you?

A. That is all I wanted to know.

Q. That is all they ever told you? A. Yes sir.

Q. They never let you examine the records in the Indian Agent's office? A. I never asked to.

Q. You don't know any way for doing that, do you?

A. No sir.

Mr. DeMueles: We object to that.

Q. You never went in the Indian Agent's office and asked to examine the records or see the records for yourself?

Mr. Thomas: We object to that.

A. Yes sir, I did.

Q. You went there and asked them to show you the record?

A. No sir, I went there and asked them in regard to certain land, whether it had a lease on it, an they told me yes or no.

Q. Yes, that is the proposition; all they told you was yes or no.

A. They told me a lease was on it or wasn't on it.

Q. You never asked to examine the records for your own satisfaction? A. No sir.

Q. What? A. No sir.

Q. Were you ever misinformed about a piece of land being leased by the officials in the Indian Agent's office?

A. No sir.

Q. Always gave you correct information? A. Yes sir.

Q. So far as you know? A. As far as I know.

Q. You had thirty days after you took your lease before you had to file it? A. Yes sir.

Q. That was the regulation of the Secretary all along the line? A. I believe so, yes sir.

Q. Now, this piece of land in controversy in this case, whether it was oil and gas territory was a matter of speculation in the fall of 1906, wasn't it? A. Largely so, yes sir.

Q. It was not at that time in the Glenn pool, or considered in the Glenn pool?

A. Well, it was in Glenn pool; it was a speculation whether it was valuable oil territory or not.

Q. Well, if it was in the Glenn pool, it was valuable oil property, wasn't it? A. Not necessarily.

Q. Isn't all the property in the Glenn pool valuable for oil purposes? A. No sir.

Q. Well, it isn't in the Glen pool if it [in't] valuable, is it?

A. Well, it might be on the shores of the Glen pool.

Q. That is a different proposition?

A. Well nobody knows where the Glenn pool is now; it is the Glenn pool, though.

143 Re-direct Examination

By Mr. Thomas:

Q. State whether or not it was a matter of common knowledge among the oil operators doing business in Indian Territory that a record of oil and gas leases was kept and maintained in the office of the United States Indian Agent.

Mr. Ramsay: I object to that for the reason that it is not the best evidence; the Indian Agent's office shows.

A. All I know, I went and had the records examined before I taken a lease or paid any money.

Q. Do you know whether that was common knowledge among the oil men or not? A. Well, I think it was.

Witness dismissed.

144 George Franklin Berryhill, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Thomas:

Q. State your name. A. George Franklin Berryhill.

Q. How old are you? A. I am twenty-eight.

Q. Where do you reside—where is your residence?

A. Five miles north of Haskell.

Q. How old are you?

A. Twenty-eight; somewhere along there.

Q. Are you the George Franklin Berryhill who executed an oil and gas lease on the NE4 of the NW4 of Section 18, and Lot

5 of Section 6, in Township 17 North, Range 12 East, to Albert W. Shulthis?

A. Well, I don't know whether it was Shulthis or who; McElwane took the lease.

Q. Did you execute a lease on or about the 24th day of March—an oil and gas lease, covering that land—the 24th day of March, 1906? A. To who?

Q. To anybody.

A. Now, I don't know just exactly, at the time.

Q. About that time.

A. Somewhere along about there, yes sir, I did.

Q. Are you married? A. Yes.

Q. State your wife's name. A. Clementine Berryhill.

Q. How many oil and gas leases have you executed on this land?

A. Well, I suppose, altogether, come right down to it, would be about three of them.

Q. When were they executed?

A. Well, I don't remember just the date, just what date they were executed on.

Q. The lease that you mention there, that you executed for McElwane, who was present when you executed that lease?

A. John Chaney, and I forget the other gentleman's name, and another fellow was there.

Q. Are you acquainted with Judge C. W. Butterworth, of Tulsa?

A. Of Tulsa? I may have met him, yes, I ain't much acquainted with him, though.

Q. Was he present when you signed that lease?

A. Signed the deed?

Q. No, the lease.

A. Now, I don't just remember; he might have been there.

Q. What consideration, if any, did you receive for the execution and delivery of that lease? A. One hundred dollars.

Q. Who paid that hundred dollars to you? A. McElwane.

Q. How did he pay it? A. Paid it to me in a check.

Q. State whether or not you got the money on the check?

A. I got the money, yes sir.

Q. State whether or not you have ever paid or offered to pay back that money, or any part thereof, to Mr. Shulthis or Mr. McElwane, or anybody for either of them?

A. No sir, I did not.

Q. State whether your wife signed that lease with you.

A. Now, I disremember whether she signed it or not; let me see—I wouldn't say certain whether she signed it.

Q. After the execution of this lease, did Mr. Shulthis, or anybody representing him, come to you to have you sign up any other papers?

A. They come and wanted some papers signed up, yes sir; but I wouldn't say whether it was Shulthis or McElwane come.

Q. Did you sign them or did you refuse to sign them?

A. No sir, I didn't sign them.

145 Q. Why didn't you sign it?

A. Because I didn't want to, is all the reason.

Q. How many times did they come to you?

A. Let me see—well, I don't know whether he ever come at all or not, but John Chaney come once or twice. I don't know.

Q. In the answer filed by the defendants in this case, there is set up as an exhibit to the answer, a deed executed by you and your wife, to Edmond McKay and Perry McKay?

A. Yes sir.

Q. The deed covering this land? A. Yes sir.

Q. At the time of the execution of that deed, did you or did you not advise them that there was an oil and gas lease on the land in controversy in this suit?

A. Yes sir, I did.

Cross Examination

By Mr. Ramsey:

Q. Where did you and your wife execute this lease?

A. I believe we lived at Sapulpa—not exactly—about a mile east of Sapulpa; southeast, at that time.

Q. Who first approached you about this lease—who first came to you about it? A. McElwane.

Q. Who is McElwane? A. I can't tell you who.

Q. Did you know him before he first came to you?

A. No sir, I didn't.

Q. Is that the first time you ever saw McElwane?

A. When I made the lease to him?

Q. Yes. A. Yes sir.

Q. That was your first acquaintance with him?

A. Yes sir.

Q. Have you ever seen him since?

A. Yes, I saw him since; here this morning.

Q. Where? A. Here at Muskogee.

Q. Was Chaney present the time you executed this lease?

A. Yes sir.

Q. How many times after that did you see him?

A. Chaney?

Q. Yes. A. Lots of times.

Q. Did he come to see you about this lease?

A. Yes; he didn't exactly say this lease, but he come down and wanted some papers fixed, and I supposed it was this lease.

Q. Did you know what kind of papers it was he wanted?

A. No, he didn't say for sure.

Q. He said he wanted something about these lease papers, didn't he? A. Yes sir.

Q. New papers? A. Yes sir.

Q. Did he tell you part of the papers you originally signed were not accord to the rules and law, and that you would have to make these papers? A. I don't believe he did.

Q. Well, what did he tell you?

A. Well, he told me about the woman's name being wrong, someway about that.

Q. What woman? A. My wife.

Q. Did he say anything about who the heirs were—heirs of Andrew J. Berryhill? A. No.

Q. Did he ask you anything about who they were?

A. No sir.

Q. Never did come back and ask you that? A. No.

Q. How many times did he come back and want you to sign new papers?

146 A. Well, he come out at the place once, I think; and I was in town all the time and he would see me now and then in town.

Q. What did he say was the matter with the woman's name?

A. He had one Clementeen and one Clementine, if I understood.

Q. He wanted you to sign a new lease?

A. Wanted to change her name some way.

Q. Wanted to change her name, or get you and her to sign a new paper? A. He didn't exactly say.

Q. You didn't understand exactly what he did say?

A. No, I didn't.

Q. And you didn't understand exactly what he had when he came back and made that statement? A. No, I didn't.

Q. You don't know whether it was the original lease you signed—

A. Well, he never did bring any papers back for me to sign.

Q. What was his purpose in asking you to sign the papers, if he didn't bring any?

A. Just took my belief, I suppose.

Q. In other words, you didn't see any papers?

A. No sir.

Q. Well, he might have had the papers with him and you didn't see them?

A. Yes, sir, he might have had the papers with him.

Q. And you refused to sign them? A. Yes sir, I did.

Q. Do you know when you made this lease?

A. To McElwane and Chaney?

Q. Yes. A. Not the day I don't.
Q. You remember what month it was in?
A. I think it was in March,—I wouldn't be sure.
Q. 1906, wasn't it?
A. Well, I don't know. I have got no education at all.
Q. Well, it was in March, 1906. Now, at the time you signed that paper, did you know that lease was made to Albert W. Shulthis? A. Not for certain I didn't.
Q. Now, I will ask you if McElwane didn't read that paper to you, that you signed that day, as a lease made to him—McElwane? A. Well, if he did, I don't know.
Q. Did he read it as made to Shulthis?
A. Well, if he did, I don't remember it.
Q. Well, you didn't know who you were making the lease to?
A. Well, not to simmer right down to the fact, I didn't.
Q. Your impression was, though, you were making the lease to McElwane, though, was it? A. Yes sir.
Q. When was the first time you ever heard of Albert W. Shulthis? A. When I brung a contest suit against him.
Q. You brought that with the Indian Agent?
A. Had it at Tulsa.
Q. You filed a contest with the Indian Agent? A. Yes sir.
Q. That was the first time you knew that Shulthis had a lease on this land? A. Yes sir.
Q. Now, you filed that protest sometime last January, didn't you,—a year ago—in the Indian Agent's office, January or February a year ago? A. It has been about a year ago.
Q. You had already sold that land at the time you—Seventy acres.

Mr. Thomas: Objected to; not the best evidence.

Q. You had made this deed to the McKays?
A. The McKays contested himself.
Q. Well, you had made a deed to the McKays before you brought this contest at Tulsa? A. Yes sir.
147 Q. Now, where did you make this trade with McKay?
A. Made it at home.
Q. Were both of them present? A. Yes sir.
Q. Edmund and Perry? A. Yes sir.
Q. How long had you known Edmund and Perry McKay?
A. Ten or twelve years.
Q. About ten or twelve years before that? A. Yes sir.
Q. Now, what was the conversation you had with them about this land?
A. Well, there wasn't much conversation we had at all.

Q. They made a proposition to buy the land from you?
A. Yes sir.
Q. And what was the price? A. Two thousand dollars.
Q. How much did they pay you down when you first made the trade?
A. I believe they paid me five hundred dollars down.
Q. To refresh your recollection, didn't they pay you four hundred dollars down?
A. Four; yes, that is what they paid me; four hundred dollars down.
Q. And they paid you the other sixteen hundred in a few days after that?
A. Well, a week or two; something like that.
Q. Just go ahead and tell what you told them at the time you had this trade.
A. Well, I didn't tell a great deal about it; I told them they had a oil and gas lease on it, and at the time I didn't believe it was any good, and I believe that was all.
Q. Did you tell them why you didn't believe it was any good? A. Yes sir.
Q. Why did you tell them?
A. Because they come back and wanted me to change my woman's name, and we didn't do it.
Q. Did you tell them who took that lease?
A. Told them who had it.
Q. Who did you tell them? A. McElwane and Chaney.
Q. Did you tell them when the lease had been taken?
A. Well, as near as I could.
Q. Did you know what kind of a lease it was?
A. Supposed to be an oil and gas lease.
Q. That is all you knew about it? A. Yes sir.
Q. Well, when you told them that there had been an oil and gas lease made on it by you and that you didn't believe it was any good, they then told you they would have to investigate the record before they would pay the rest of the consideration, didn't they?
A. They told me they had to get an abstract.
Q. And that was the reason why they didn't pay the other sixteen hundred dollars, wasn't it?
A. Well, they didn't say; they told me they would pay the four hundred down and pay the other in a few days, and I found out they got an abstract.
Q. Didn't they tell you they would have to get an abstract?
A. I don't believe they did.
Q. You are not positive? A. No, I am not positive.
Q. You can't say they didn't tell you that?
A. No, I wouldn't say for certain.

Q. You have been at Mounds, haven't you—Indian Territory? A. Yes sir.

Q. Do you know Monte A. Shipman?

A. I did know him, but I have forgotten.

Q. Do you know William F. Dermott?

A. Might have been acquainted with him, but if I have, I have forgotten.

Q. I will ask you if on March 25th, 1907, if you didn't address a letter to the Honorable Dana H. Kelsey, United States Indian Agent, Muskogee, Indian Territory, in the following words and figures:

148 "Mounds, Indian Territory,
March 25th, 1907.

Hon. Dana H. Kelsey, U. S. Indian Agent,
Muskogee, Indian Territory.

Dear Sir: As a further reason for protest on my part against approval of Oil and Gas Mining Lease executed by me on or about March 23rd, 1906, purporting to be executed in favor of one Mr. Shulthis, I desire to say that one Eugene McElwaine took said lease from me and paid me $100. bonus therefor, representing to me that he was taking said lease for himself, and I never knew until recently that Mr. Shulthis had anything to do with said lease. Said lease above referred to being on the following land (being a part of the allotment of my minor son, Andrew J. Berryhill, deceased):

The NE/4 of the NW/4 of Section 18; and the SW/4 of NW/4 of Section 6; all in Township Seventeen, (17) North, Range Twelve (12) East, and being within the Creek Nation, Western District of the Indian Territory.

Eugene McElwaine told me that he was taking the lease for himself and so read the lease to me (I cannot read english for myself); he further said that he would drill on said land within one year from date of execution of said lease. He read the lease to me and from the way he read it it did not say anything about the Secretary of the Interior having to approve the lease before the said McElwaine would drill for oil or gas.

I have sold all of said land now and do not want said lease approved. It was fraudulently taken from me as aforesaid, still I am perfectly willing to pay Mr. Eugene McElwaine back his $100. as I do not want something for nothing.

For further grounds of protest will say that Mr. McElwaine did not comply with the rules and regulations of the Interior Department in force on March 23rd, 1906 in that he used the

wrong blank lease blanks. He afterwards tried to get me to execute the lease on the correct blanks which I refused to do.

I never heard of any Mr. Shulthis and never heard his name mentioned in my life until I filed the first protest in this case, at which time I was advised that the records of the Indian Agent's office showed that the lessee in said lease was one Mr. Shulthis (I forgot what said lease shows his first name to be).

Very truly yours,

(Signed) GEORGE F. His X Mark BERRYHILL.

P. O. Sapulpa, I. T.

Witness to Mark:
Monta A. Shipman
William M. Dermott".

Q. Did you sign that paper?

149 Mr. Thomas: We object to that as incompetent, immaterial, and irrelevant, for the reason that it does not tend to prove or disprove any of the issues of the case, and if asked for the purpose of impeaching the witness, the proper foundation is not laid.

Q. Did you sign that letter?

A. Well, it don't seem like I signed all that was wrote in there; I have signed some, but it don't seem like everything is just exactly right in that?

Q. The appearance that it wasn't exactly right occurred to you after Mr. Thomas made this objection, hasn't it?

Mr. Thomas: We object to that question as incompetent, irrelevant, and immaterial.

Q. I want to know if it didn't occur to you that there were some things in here that wasn't there when you signed it, after Mr. Thomas made that objection?

Mr. Thomas: Renew the objection made to the preceding question.

Q. Answer that now, state how that is.

A. Read that over again.

(Mr. Ramsey reads from letter)

A. Now, wait a minute; "sold all of said land". I didn't have that in there; I had forty acres of that land.

Q. Forty acres of the land?

A. When was that given?

Q. This was on March 25th, 1907.

A. I sold forty acres of that land—the last forty acres; sold it in March or April, I won't be sure which.

Q. 1907? A. To Moss.

Q. Now, which forty was it you sold to Moss?

A. Section six, I think.

Q. This other forty had been sold prior to this?

A. The 70 acres?

Q. 70 acres, yes. A. Yes sir.

(Mr. Ramsey reads further from letter)

A. Well, I don't believe, about the blanks; that they used the blanks in there.

Q. And what he wanted you to do was to correct the name?

A. Yes, to correct the name.

(Mr. Ramsey continues to read)

Q. Now, did you sign that paper? A. I did.

Q. Now, on June 5th, 1906, you and your wife executed and delivered to Edmund McKay and Perry McKay a deed, reciting a consideration of two thousand dollars, in which you said:

" * * * does hereby grant, bargain, sell convey, and confirm unto the said parties of the second part the following described real estate and premises situate in the Muskogee or Creek Nation, and within the limits of the Indian Territory, to-wit: The Northeast quarter of the Northwest quarter of section 18—the east half of the northwest quarter of the northeast quarter and the southwest quarter of the northwest quarter of the northeast quarter of Section 13—Township -17- North and Range -12- East, of the Indian Base and Meridian, in the Ind. Ter. containing -70- acres, more or less, the
150 above described land being part of the allotment of Andrew J. Berryhill, our deceased son. Said Andrew J. Berryhill died about October 1st, 1901. We being the sole and only heirs of the said Andrew J. Berryhill, deceased, together with all the improvements thereon, and the appurtenances and immunities thereunto belonging or in any wise appertaining thereto." Now, you executed that deed and warranted the title, didn't you?

A. Yes sir.

Q. Now, in here you say "and we the said George F. Berryhill and Clementine Berryhill for ourselves and our heirs, executors and administrators do covenant with the said Edmond McKay & Perry McKay and their heirs, successors and assigns, that we are lawfully seized in fee of the aforegranted premises; that they are free from all incumbrances; that we have good right to sell and convey the same to the said Edmond

McKay and Perry McKay as aforesaid; and that we will and our successors, heirs, executors and administrators shall warrant and defend the same to the said Edmond McKay and Perry McKay—" A. Yes sir.

Q. Now, then, you must have represented to them that there was no incumbrances on this land—with that deed in the language that it is. A. That lease?

Q. No, this deed. A. What deed is that?

Q. The deed that you made to Edmond and Perry McKay, which I have just read you, in which you warrant that there is no encumbrances on that land.

A. I told them there was a lease on it; they know it, at the time, when they bought it.

Q. Why did you say in this deed there were no encumbrances on that land? A. They didn't put it in there.

Q. You signed it. A. Yes sir, I signed it.

Q. You knew what you was signing?

A. I told them about it, before they took the lease on it.

Q. You knew what you were signing before you signed that deed?

A. If they read it right I did, and if they didn't I didn't.

Q. Well, the deed was read to you, wasn't it?

A. Yes. They was knowing that the lease was on it.

Q. They didn't know that lease was any good, did they?

A. Not that I know of, they didn't.

Q. You told them it wasn't?

A. As well as my memory—

Q. You didn't think it was any account?

A. Yes sir, I didn't.

Q. And you didn't hesitate to tell them?

A. Yes sir, I told them.

Q. That you didn't consider the land did have a lease on it, did you? A. No sir, I didn't.

Q. If you had considered there had been a lease on that land, you would have been honest enough to have told them, right there? A. Yes sir.

Mr. Thomas: We object to that as incompetent, irrelevant, and immaterial.

Q. I will ask you, Mr. Berryhill, if you know Ben D. Marr, a Notary Public at Sapulpa—Ben D. Marr?

A. Yes sir, I am acquainted with him.

Q. Now, I hold in my hand what purports to be an affidavit of yourself, in the following words and figures, which I will read to you:

151 "United States of America,
Indian Territory,
Western District—ss.

Affidavit of George F. Berryhill.

George F. Berryhill, of lawful age, being by me first duly sworn, according to law, upon his oath deposeth and states that on the fifth (5th) day of June, A. D. 1906, this affiant sold the following land to Perry and Edmond McKay, this affiant and the wife of this affiant, Clemintine Berryhill, executing a warranty deed therefor to the said McKays, to-wit:

The Northeast quarter (1/4) of the Northwest quarter (1/4) of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian, containing Forty (40) acres, more or less, according to the Government Survey thereof, and being within the Creek Nation, Western District of the Indian Territory.

That this affiant informed the said McKays, that, at the time of the execution of said warranty deed, that, in the opinion of this affiant, there was no oil and gas lease of any kind upon said land. Affiant further states that, prior to the execution of said deed, that he told the said McKays that he and his wife had given some kind of lease papers to one McElwain, but that they were of no force or validity and that the said McElwain came to this affiant several times to get said papers properly executed on proper blanks which this affiant refused to do.

Affiant further states that the McKays had an abstract of title prepared before they paid him for said land.

Affiant further states that he never heard of Albert W. Shulthis until long after he and his wife deeded said land as aforesaid to the said McKays; and that the said McElwain represented to this affiant that the lease papers which the said McElwain had this affiant to sign and the others which the said McElwain desired this affiant to sign were between the said McElwain and this affiant.

Witness: Shel Moses GEORGE F. x BERRYHILL
Witness to mark H. T. Ellif his mark

Subscribed and sworn to before me on this the 15th day of July, A. D. 1907.

(Seal) REN D. MARR, Notary Public.
My Commission expires Jan. 12, 1911."

A. Well, if I understand it right—

Q. Now, the first question is did you sign that affidavit?

Mr. Thomas: We object to that as incompetent, immaterial, and not proper cross examination, and does not tend to prove or disprove any issues in this suit.

Q. The question is did you sign that affidavit?
A. Not all there is in it, I didn't.
152 Q. Take this paper and examine it.
A. I can't read. Don't know one letter from another.
Q. You did make an affidavit before Mr. Marr?
A. Yes sir.
Q. You signed a typewritten affidavit? A. Yes sir.
Q. On or about July 15th, 1907, somewhere along there?
A. I disremember just when it was.
Q. Now, what part of this affidavit I have read to you was not correct?
A. Well, about mentioning the deed to the woman; they got the land in there wrong.
Q. Is that all?
A. Well, I don't know. Might be some more there, if you read it over again.
Q. I will read it again (Reads affidavit).
A. I didn't sell that land to Edmond and Perry McKay.
Q. On June 5th? A. Not that piece of land.
Q. Well, the land here described—the northeast quarter of the northwest quarter?
A. Well, if I understood it right, it is the piece I deeded to my woman?
Q. No, this describes the land—the northeast quarter of the northwest quarter of section 18, and you and your wife deeded it to the McKays. Your wife signing the deed with you.
A. Deeded it to McKay?
Q. Yes. There is nothing in here about deeding anything to your wife. The northeast quarter of the northwest quarter of Section 18, 17, 12, containing forty acres more or less, according to the Government survey thereof, and being within the Creek Nation. (Continues to read from affidavit.)
A. He didn't come several times; he might have come once.
Q. That is the corrections, then, you want to make in that affidavit? A. Yes sir.
Q. Now, with these corrections, is that affidavit the fact?
A. Well, read it on out. (Reads further.)
Q. Now, with these corrections you have mentioned is this affidavit correct? A. Yes sir, I believe it is.

Mr. Thomas: We ask that all the questions and answers relating to the two affidavits read over by solicitor for defendant be stricken from the record for the reason that the same is incompetent, immaterial and irrelevant, and do not go to prove or disprove any issues in this case, and if asked for the purpose of impeaching this witness, proper foundation has not been laid. And for the further reason that the approval of the Secretary of the Interior of the oil and gas lease as shown

by exhibit one, to the complainant's bill filed herein, is conclusive of all the matters set forth in both of said affidavits.

Witness dismissed.

Jesse I. Gillespie, being first duly sworn and examined, upon examination, testified as follows:

153 Direct Examination

By Mr. Thomas:

Q. State your name, and age, and place of residence?

A. Jesse I. Gillespie; 32; Tulsa, Oklahoma.

Q. What is your occupation, Mr. Gillespie?

A. Oil operator.

Q. How long have you been in the oil business?

A. In the neighborhood of fifteen years.

Q. In what places?

A. Ohio, Pennsylvania, Kansas, Oklahoma, and Indian Territory.

Q. How long have you been engaged in the oil business in Indian Territory, or what is known as the State of Oklahoma?

A. Since June 1904; that is, I have been working in that line; I was doing some drilling here in June, 1904, at Sapulpa.

Q. In what part of the Indian Territory were you engaged in the oil business— what Nation?

A. The Creek and Cherokee Nation, mostly Creek.

Q. How long have you been engaged in the oil business in Creek Nation?

A. Well, I came in Sapulpa first in June, 1904— wait a minute; I believe it was—1905; I will correct that.

Q. State whether or not you are familiar and acquainted with the limits of the proven oil territory in what is known as the Glenn field? A. I am very well acquainted there.

Q. What township and range is the Glenn field in?

A. Mostly in 17, 12.

Q. Township 17 North, Range 12 East? A. Yes sir.

Q. State whether or not the Northeast quarter of the northwest quarter of section 18, township 17 north, range 12 east, is in the territory known as the Glenn fields.

A. Well, yes, Section 18 is in the Glenn field.

Q. State whether or not, in the month of October, 1906, you were familiar and acquainted with the limits of the proven oil territory in what is known as the Glenn field, and what was then known as the Glenn field?

A. Well, I was acquainted with the development at that time.

Q. State whether or not the land which I have just described was then in the—was then known as proven territory proven oil territory?

Mr. Ramsey: I object to that because it is leading.

A. Well, it was in the prospective area of production.

Q. State how far, if you know, that piece of land was from development at that time?

A. Well, I cannot exactly get to it, I believe; at that time, or just about that time, there was production in 8.

Q. Section 8? A. Section 8.

Q. State whether or not you have had any experience with taking oil and gas leases in the Creek Nation? A. I have.

Q. State whether or not you have any interests in oil and gas leases or lands in the Creek Nation.

A. I am interested in the Rich Oil Co. Was interested in the Hamilton-Gillespie-D. A. McDougal property; and Clinton-Clinton property; sold out of that though.

Q. Is or is not your property in the Glenn field?

A. It is.

154 Q. When did you first become interested in leases in the Creek Nation?

A. I took leases for Smith & Swan in the Creek Nation in July 1905.

Q. State what exerience you have had in taking oil and gas leases in the Creek Nation, briefly.

A. Well, I don't know how to put that, any more than I took a good many leases there.

Q. On what form were most of your leases taken?

A. Mostly on the Indian form, prescribed by the Interior Department.

Q. When did you first hear of the rules and regulations of the Secretary of the Interior, relative to the taking, filing, and perfecting of oil and gas leases on land in the Creek Nation?

Mr. Ramsey: Object to that because it is immaterial when the witness heard of it.

Q. Go ahead.

A. I was instructed in that line along in June and July, when I started to take leases for Smith & Swan. At that time, I was instructed in the—

Q. State whether or not you are familiar and acquainted with the substance and contents of the rules and regulations of the Secretary of the Interior, relative to the taking, filing, and perfecting of oil and gas leases on the lands of citizens of the Creek Nation?

A. Well, I have an idea about them; I take leases, and I think—

Q. Well, do you know or don't you know, the general contents and substance of the regulations?

A. I know it in a general way, yes.

Q. When did you first become acquainted with the contents and substance of the rules and regulations of the Secretary of the Interior, relating to oil and gas leases?

A. Well, as I say, it was about the time I started in with Smith & Swan, along in June or July 1905.

Q. State whether or not you were acquainted with most of the oil operators doing business in Indian Territory?

A. I am, a great many of them.

Q. State whether or not you have heard much discussion among the oil producers in Indian Territory of the rules and regulations of the Secretary of the Interior?

A. It is quite a common conversation.

Q. State whether or not the substance and contents of the rules and regulations of the Secretary of the Interior, relating to the taking, filing, and perfecting of oil and gas leases on lands in the Creek Nation is a matter of common knowledge among the oil operators doing business in the Creek Nation?

A. It is, or it won't take them long to find it out; I have always—it seems, though, they have got to go through a certain routine of work in order to have a lease placed before the Interior Department, in the correct form.

Q. Now, state, if you know, what disposition of oil—was made of the oil and gas leases taken by oil men under the rules prescribed by the Secretary of the Interior—what disposition was made of them?

A. They were filed with the Interior Department; or the Agency, here at Muskogee, rather.

Q. Was that, or was it not, the general custom of all producers? A. It was necessary.

Q. Well, was that or was that not the general usage or custom among the oil producers taking leases in the Creek Nation?

A. I didn't quite catch the question.

155 Q. Was it or was it not the general custom of oil operators taking leases in the Creek Nation to file the leases with the Indian Agency soon after they were executed?

A. Yes sir, it was.

Cross Examination

By Mr. Ramsey:

Q. This land Mr. Thomas read you the description of was speculative territory in October, 1906, wasn't it?

A. Well, it was within the district of possibilities.

Q. It was not, at that time, proven oil territory?

A. Well, there was no wells on it.

Q. Well, was any wells right around there, that demonstrated this land was proven territory?

A. Well there was production north and south, quite a long ways there to the length of the field at that time, would

demonstrate that its width—that this piece was within the possibility as to width.

Q. Isn't it a fact there wasn't anything north or south but that the production was northwest or northeast?

A. Well, on a line north and south there was production—that is, due north of this property I don't think there was, but on a line north and south extending past the lines of this piece.

Q. Now, in October 1906, isn't it a fact there wasn't a well in two miles of this piece of land?

A. Well, I can't give you the exact dates there, but my memory seems to be that there was a well in section eight; I am not positive of that, though. I took a lease for Mr. McDougal there, and if I knew the date of that lease, I would be more positive whether there was a well there or not.

Q. Now, you say all oil men discussed the rules and regulations of the Secretary a great deal? A. Very much so.

Q. I will ask you if they weren't "cussed" more than "discussed"? A. I will agree to that, too.

Q. The main discussion of the regulations of the Secretary were criticisms of the rules, from the oil men, wasn't it?

A. Well, there was a great deal of criticism; the criticisms would be in the red tape a man has to go through in order to comply with the rules and regulations prescribed for us.

Q. Criticisms on account of the red-tape.

A. Yes, the red-tape a man had to go through.

Q. You run with Charley Ragsdale a good deal, don't you?

Mr. Thomas: We object to that.

Mr. Ramsey: I want to impeach the witness.

Witness dismissed.

J. H. Winemiller, being first duly sworn, upon examination, testified as follows:

Direct Examination

156 Mr. Thomas:

Q. State your name, age, and place of residence?

A. My name is J. H. Winemiller; 26; reside at Tulsa, at present.

Q. What is your occupation?

A. Well, I am part of an oil man, is about all you could say.

Q. How long have you been engaged in the oil business?

A. That is all I ever knew. I never did anything else. In the east I always was in the oil business.

Q. In what localities?

A. Well, mostly in West Virginia, Ohio, Pennsylvania some, and Kentucky.

Q. State how long, if any time, you have been engaged in oil business in Indian Territory?

A. Well, I have been out here, now about—little over three years. Three years and four months; part of the time, a few months, I was in Kansas. I have been in the Creek Nation, now, off and on, about two years, eight months; something like that.

Q. State whether or not you are acquainted and familiar with the limits of the present oil territory in what is known as the Glenn field? A. Yes sir, fairly well.

Q. In what township and range is the Glenn field?

A. Township 17, Range 12, mostly; some of it is over in eleven; range 11.

Q. State whether or not, in the month of October, 1906, you were familiar and acquainted with the limits of the proven oil territory in what is known as the Glenn field?

A. Yes sir, I think so.

Q. State whether or not the northeast quarter of the northwest quarter of section 18, township 17 north, range 12 east, is within the limits of the proven oil territory in the Glenn field?

A. Yes sir, if I am not mistaken, I think it has a well or two on it now.

Q. State whether or not that was within the proven oil territory in the Glenn field in the month of October, 1906?

A. Well, it was considered oil territory, but it wasn't absolutely proven; it was surrounded by production. There was production at that time. I think Selby drilled a well at that time, in section 8, little northeast of there.

Q. State whether or not you have any interest in leases on lands of citizens of the Creek Nation? A. Yes sir.

Q. When did you first become interested in leases in the Creek Nation—oil and gas leases?

A. About two years and eight months ago, I should judge.

Q. State whether or not—

A. That is, I wasn't personally interested; I was in connection, leasing, at that time, but I was doing some work for other people.

Q. State whether or not you have had any experience in taking oil and gas leases on lands of citizens in the Creek Nation? A. Yes sir.

Q. Over how long a period has that experience extended?

A. Practically all of the time I have been here.

Q. Two years?

A. Yes sir; often and on; I was on a lease; most the time I was out leasing.

Q. On what form were most of your leases taken?

A. Most of them were taken on Departmental form—the Government lease.

Q. State whether or not you are familiar and acquainted with the general contents and substances of the rules and regulations of the Secretary of the Interior, relating to the taking, filing, and perfecting of oil and gas leases on the lands of citizens of the Creek Nation?

A. Yes sir, I try to be; it is pretty hard to do sometimes.

157 Q. When did you first become acquainted with the general contents and substance of the Secretary's rules and regulations in that regard?

A. Well, I don't know; I suppose that was before I came to the Territory.

Q. State whether or not you are generally acquainted with the oil operators doing business in what was the Indian Territory?

A. Yes sir, a great many of them; the majority of them.

Q. State whether or not the Secretary's rules and regulations with regard to the taking, filing and perfecting of oil and gas leases was and is much-discussed among the oil operators doing business in what was Indian Territory?

A. Yes sir, very much.

Q. State whether or not the substance and contents of the rules and regulations of the Secretary of the Interior, relating to the taking, filing and perfecting of oil and gas leases in the Creek Nation, were and are a matter of common knowledge among the oil operators? A. Yes sir, I think so.

Q. Now, what disposition was and is generally made of the Departmental leases taken by oil operators in Indian Territory?

A. Well, after this—at what time, at the present time?

Q. No, during the last two years?

A. Well, after a man having executed a lease, it is supposed to have been filed here with the Leasing Department of the Indian Agency, just as quickly as possible.

Q. State whether or not that has been the usage and custom among all the oil men?

A. Yes sir, among all the men with whom I have been connected.

Q. State whether or not it is generally known among oil operators in Indian Territory that the rules and regulations of the Secretary of the Interior, require oil and gas leases to be filed with the Agency—Union Agency? A. Yes sir.

Cross Examination

By Mr. Ramsey:

Q. You said it was pretty hard to keep up with the rules of the Secretary, didn't you? A. Beg your pardon?

Q. You said it was pretty hard to keep up with the rules and regulations of the Secretary, didn't you?

A. Well, a man had them to read; I don't know that they were so difficult.

Q. They changed them every now and then?

A. Some changes, yes sir.

Q. The main discussion among oil men that you heard of the rules of the Secretary of the Interior, have been in the nature of criticisms?

A. Well, some; some seemed to like them.

Q. The majority you have heard have been criticisms of the regulations?

A. Well, I don't know. Of course, they have been bitterly criticised, but a great many people seemed to favor the Departmental form for the reason—I don't know; it is only supposition.

Witness dismissed.

158 February 4th, 1908.

J. A. Hull, being first duly sworn, upon examination, testified as follows:

Direct Examination

By Mr. Thomas:

Q. State your name, age, and place of residence.

A. J. A. Hull; Independence, Kansas; age, 37.

Q. What is your occupation, Mr. Hull?

A. Why, I am in the oil business.

Q. You have been sworn as a witness?

A. I have, yes.

Q. Are you the J. A. Hull, who is named as assignee in an assignment executed on November 30th, 1906 by Arthur B. Reese and Harriet I. Reese his wife covering the northeast quarter of the northwest quarter of section eighteen, township seventeen north, range twelve east, a copy of the assignment being filed—being attached to the defendant's answer herein, as exhibit "D"? A. I am.

Q. What, if any, consideration was paid by you or anyone for you for that assignment?

A. It was two hundred dollars I paid for that quarter interest.

Q. How was that consideration paid; that is, was it paid in money, or how?

A. Well, it was, as far as I was concerned; it was the same

thing as money. Mr. Reese asked me if I would take the quarter interest, and I told him that I would, and that is all there was to it, until we had a final settlement.

Q. Then, in fact, when did you pay the two hundred dollars?

A. Well, he charged it up to me at that time, but we had a good bit of dealing back and forth, and didn't have a final settlement until later.

Q. About what time?

A. Well, if I remember right, it was along about June.

Q. What year? A. 1907.

Q. Then you paid the consideration in June 1907?

A. Well, I figured that I was paying it then, of course, as he had it charged up to me at that time.

Q. State whether or not at the time of the execution and delivery of this assignment, any consideration passed from you to Mr. Reese? A. Wasn't anything.

Q. State whether or not you, at the time of the execution and delivery of this assignment, you were indebted to Mr. Reese, or Mr. Reese was indebted to you?

A. Why, he was indebted to me.

Q. State whether or not he was indebted to you in the sum or more than the sum of two hundred dollars.

A. It was more than two hundred dollars.

Q. At the time of the execution and assignment?

A. It was more than two hundred dollars at that time.

Q. And this was charged against your account—the mutual account?

A. Why, I presume he charged it up against me on his book; I don't know, but I know it was later on, when we came to make a settlement.

Q. State whether or not this two hundred dollars was part of the settlement in June, 1907?

A. Yes, that was part of the settlement.

159 Q. State whether or not this two hundred dollars, in June, 1907, was deducted from the balance that he owed you at that time, figured in the balance of his indebtedness to you.

A. Why, at that time, he just rendered me a bill for what I owed him and I rendered him a bill for what he owed me.

Q. And this two hundred dollars—

A. That was included in that, yes.

Q. How, long, Mr. Hull, have you been in the oil and gas business in Indian Territory?

A. Something over three years.

Q. Did you ever hear of the Secretary's rules and regulations affecting the taking of oil and gas leases in the Creek Nation? A. Yes sir.

Q. How long have you known them—the substance and contents of them?

A. Well, something over three years.

Q. Will you state whether or not the substance and contents of the Secretary's rules and regulations, relative to taking, filing, and perfecting of oil and gas leases in the Creek Nation, has been generally known to the oil men operating in Indian Territory, within the past two years?

A. I think so; in my opinion it was generally known, yes.

Cross Examination

By Mr. Ramsey:

Q. Where were you and Reese at the time you had this agreement with him to accept an assignment of an interest in that lease?

A. Well, I don't remember where we were; it seems to me when he first talked to me about it, was out on our lease in the Glenn pool.

Q. The date of that assignment is November 30th, isn't it?

A. Yes, that assignment was sometime later.

Q. Really you had the trade for that interest before the assignment was executed and delivered?

A. Oh, yes; yes, it was sometime before this was made.

Q. At that time, you say, he was indebted to you?

A. Yes sir.

Q. And you accepted that assignment as being pay for—of what he owed you at that time, by the amount of the assignment? In other words, you considered that was paid for when he delivered it to you?

A. Oh yes, sir; I considered it that way, at that time.

Q. Did you know anything about Shulthis having any lease on this property?

A. No, not when I bought it; in fact, quite a while after this.

Re-direct Examination

By Mr. Thomas:

Q. Mr. Hull, at the time the lease on this land was originally taken by Mr. Reese, did you have any interest in the lease or agreement for an interest at the time that was taken?

A. At the time he took the lease?

Q. Yes sir. A. No sir.

Witness dismissed.

160 E. R. Kemp, being first duly sworn, upon oath, testified as follows:

Direct Examination

By Mr. Thomas:

Q. You state your name, age, and place of residence, please.

A. E. R. Kemp; 36; Tulsa, Oklahoma.

Q. What is your occupation, Mr. Kemp?

A. Oil producer.

Q. How long have you been in the oil business?

A. I have been in it for seventeen years.

Q. How long, if any time, have you been engaged in the oil business in the Creek Nation, Oklahoma—in the Creek or Cherokee? A. Well, four years.

Q. How long in the Creek Nation? A. Year and half.

Q. State whether or not you are familiar with the limits of the proven territory in what is known as the Glenn field, Creek Nation? A. Yes sir.

Q. State whether or not about in October, 1906, you were familiar with the limits of the proven territory of the Glenn field?

A. I don't think that the limits were defined in October, 1906—the limits of the Glenn pool.

Q. What township and range is the Glenn pool in?

A. 17, 12. You nearly had me there.

Q. State whether or not in the month of October, 1906, the northeast quarter of the northwest quarter of section 18, township 17 north, range 12 east, was generally regarded as proven oil territory.

A. Well, sir, I would like to have a map; I can't say offhand; if you will just show me a map, I know the section and township. (Witness examines map).

Q. State whether or not this was regarded as oil territory.

A. No, I don't think it was.

Q. Was it regarded at that time as having any probable value for oil and gas? A. Yes sir, it was.

Q. Any considerable value?

A. Well, it was, I think, at that time—it was considered a fair gamble. It was not proven non-productive, nor productive. It would be a good gamble.

Q. When did you first become interested in leases in the Creek Nation? A. In January, 1904.

Q. Have you or have you not had any experience in taking leases in the Creek Nation?

A. Yes, I have had a great deal of experience.

Q. Have you had any experience, or not, in taking leases on the forms prescribed by the rules and regulations of the Secretary of the Interior? A. Yes sir.

Q. On what form did you take most of your leases?

A. On the Departmental form.

Q. State whether or not you are pretty generally acquainted with the oil men operating in the Creek Nation.

A. Yes, I am.

Q. What disposition was generally made by oil men taking leases of leases as soon as they were executed and delivered?

A. They were filed with the Indian Agency for approval.

Q. State whether or not that was the usual usage and custom among the operators? A. It was.

Q. Are you or are you not familiar with the general substance and contents of the rules and regulations of the Secretary, relating to the taking, filing, and perfecting of leases on lands in the Creek Nation? A. I am.

161 Q. How long have you been generally acquainted with them?

A. Well, ever since I came to the country, I have watched the rules and regulations very closely.

Q. State whether or not, among oil men, you have heard the Secretary's rules and regulations very much discussed?

A. I have.

Q. State whether or not the substance and contents of the rules and regulations of the Secretary of the Interior, relating to the taking, filing, and perfecting of oil and gas leases on lands in the Creek Nation, were in the past two years, a matter of common knowledge among the oil men.

A. I think it was.

Cross Examination

By Mr. Ramsey:

Q. You say that it was the general custom and [useage] of oil men in taking leases to file those leases in the office of the Indian Agent for the approval of the Secretary? A. Yes sir.

Q. That was only necessary where the lease was taken upon the form prescribed by the Secretary—that is correct, isn't it?

A. Yes, sir.

Q. Now, I will ask you if it is not a fact that instead of the filing of these leases in the Indian Agent's office being a custom and usage, it wasn't a necessity, required by the rules of the Secretary? A. What was that, please?

Q. Instead of that being a mere custom and usage of the oil men, wasn't it a necessity that these leases on the Departmental form, be filed with the Indian Agent?

A. It was a necessity to file them within thirty days.

Q. Yes; that is all.

Re-direct Examination

By Mr. Thomas:

Q. Mr. Kemp, do you know whether or not there were many leases—departmental leases, taken in the Creek and Cherokee Nation, up to the middle of October, 1906?

A. There were not very many in the Cherokee Nation, but there had been quite a number of commercial leases taken in the Creek Nation.

Q. On what kind of lands, in the Creek Nation, was it generally the custom to take commercial leases?

A. On the surplus allotments of the Freedmen.

Re-cross Examination

By Mr. Ramsey:

Q. It was also the custom to take commercial leases on any lands from which the restrictions were removed in the Creek Nation, also? A. Yes sir.

162 Q. Now, you say the rules and regulations were discussed among oil men, and that they filed their leases with the Indian Agent when they were on the Departmental form; it is a fact that if a party contemplating the approval of by the Secretary of a lease, that he had to familiarize himself with the rules and regulations of the Secretary, in order to know how to proceed—that is a fact, ain't it?

A. Why, yes, he should know what to do, but it had been the general custom—there was so much red-tape about it—lots of the operators used lawyers. Some of them didn't know what they were doing.

Q. Some of the lawyers didn't know what they were doing?

A. No, the producers. Some of them would get in trouble sometimes, though, they changed so often.

Witness dismissed.

Arthur B. Reese, being first duly sworn, upon oath, testified as follows:

Direct Examination

By Mr. Thomas:

Q. State your name, age, and place of residence?

A. Arthur B. Reese; about 27 this year; Independence, Kansas.

Q. Have you been sworn as a witness in this case?

A. Yes sir.

Q. What is your occupation, Mr. Reese?

A. Well, an oil operator.

Q. Are you the Arthur B. Reese who, on the 30th day of November, 1906, executed with Harriet I. Reese—executed an assignment to a one-quarter interest to the oil and gas right in and to the northeast quarter of the northwest quarter of section 18, township 17 north, range 12 east, in the Creek Nation, to J. A. Hull; said assignment being shown by exhibit "D" filed with the answer of the defendants in this case? A. I am.

Q. What, if anything, was the consideration for that assignment?

A. This instrument states the sum of one dollar and other valuable considerations. The assignment was made in connection with some other property.

Q. What was the consideration of the assignment of this quarter interest? A. It was two hundred dollars.

Q. State whether or not at or about the time of the execution and delivery of that assignment, Mr. Hull, the assignee, paid you any consideration for it, in cash, or in money?

A. No sir; I gave him credit on my books, or I made a charge to him for that amount on my books, and he gave me credit on his.

Q. State whether or not at the time of the execution and delivery of this assignment, you were indebted to Mr. Hull in any amount. A. I would say that I was.

Q. Was the amount two hundred dollars, or over?

A. Yes, sir.

Q. When, after this execution and delivery of this assignment did you and Mr. Hull have a settlement of your accounts?

A. What was the date of that?

Q. About when did you have a settlement with Mr. Hull, to adjust your balance? A. Well, it was in June, probably.

Q. June, 1907? A. Yes sir.

163 Q. Now at the time you had this settlement, state whether or not that was the time that you got the credit for this two hundred dollars.

A. That was the time that I received credit.

Cross Examination

By Mr. Ramsey:

Q. Well, at the time you assigned it to him in November, 1906—wasn't it? Isn't it a fact that you were really credited then, but that you did not have your settlement until June, 1907?

A. Well, in our dealings, we both paid out money, you know.

Q. Yes.

A. And each keeps an account of the amounts, and we have a settlement possibly twice a year, and at the time that I made this assignment to him, of course I charged him two hundred dollars on my books. If anything should have happened to me, I would have had that charge made. But the fact of the matter was I did not actually receive the compensation until we made our final settlement in June.

Q. Well, didn't he give you credit for the two hundred dollars at the time you made the assignment to him?

A. Well, I should think he should have, on his books; that would have been proper.

Q. At the time you had the settlement, didn't it show he had given you credit for the assignment?

A. Yes sir, I think his books showed that.

Mr. Ramsey: We want to ask this witness some questions not proper cross-examination.

Mr. Thomas: By agreement of the parties—

Mr. Ramsey: Witness is here recalled and examined in chief as a witness of the defendant.

Arthur B. Reese, being recalled, further testifies as follows, on behalf of the defendants:

Direct Examination

By Mr. Ramsey:

Q. Reese, are you personally acquainted with Edmond and Perry McKay?

A. No sir; I am acquainted with one of the McKays; I can't say now, which one it is. I am not well acquainted with either one of them. I didn't know either party at the time this lease was made.

Q. Now, the record shows that on October 12th, 1906, Edmond and Perry McKay executed to you an oil and gas lease on this land in controversy. Did you take that lease in person —that is, did you personally negotiate for that lease?

A. No, sir.

Q. Who represented you in the procuring of that lease?

A. Josiah G. Davis.

Q. Where did Josiah G. Davis live? A. Mounds.

Q. Mounds, Indian Territory, at that time? A. Yes sir.

Q. Now, I will ask you, Mr. Reese, if you had anything to do personally with the taking of that lease from Edmond and Perry McKay? A. No sir.

164 Q. Did you trust entirely to Josiah G. Davis to represent you in that transaction?

Mr. Thomas: Object to that question as leading.

A. You mean in securing the lease?

Q. Yes. A. Yes, sir.

Q. Now, I will ask you whether or not you had any notice or any knowledge of Albert W. Shulthis, the plaintiff in this case, claiming that he had a former lease for oil and gas purposes on this land, from the prior owners, George Franklin Berryhill and Clemintine Berryhill.

Mr. Thomas: Complainant objects to that question as leading.

Q. Answer the question. A. No sir.

Q. Did you know at the time this lease was taken by Josiah G. Davis for you from Edmond and Perry McKay, on October 12, 1906, that George Franklin Berryhill and Clemintine Berryhill had entered into any kind of lease contract with Albert W. Shulthis. A. No sir.

Q. Had you heard any rumor to the effect? A. No sir.

Mr. Thomas: We object to that question as incompetent, irrelevant, and immaterial..

Q. Do you know what consideration, if any, Josiah G. Davis paid to Edmond and Perry McKay for that lease?

A. Davis represented to me that he paid eight hundred dollars.

Mr. Thomas: Defendant (complainant) asks that that question and answer be stricken, for the reason that it is not responsive, and the answer given is hearsay.

Q. I will ask you, Mr. Reese, this question—whether or not Davis said anything to you about the price for which this lease could be obtained, before the time—before the lease was actually taken October 12th?

Mr. Thomas: Object to that as incompetent and hearsay.

A. Yes sir.

Q. What price did Davis first inform you that the lease could be obtained for?

Mr. Thomas: Object to that as immaterial, irrelevant and hearsay.

A. Eight hundred dollars.

Q. Did you accept that proposition, when it was first made to you?

Mr. Thomas: Object to that as leading.

A. No sir.

165 Cross Examination

By Mr. Thomas:

Q. Mr. Reese before this lease to you was executed and delivered was there any agreement between you and Davis as to an interest Davis was to have in the lease? A. Yes sir.

Q. What was that agreement—what interest was he to have?

A. Davis was to carry one-eighth.

Q. That agreement was made before the lease was executed and delivered by the McKays—by Perry McKay and Edmond McKay to you? A. That was the understanding.

Q. Who was the notary that took the acknowledgment to that lease?

Mr. Ramsey: Object to that, because the lease shows for itself.

Mr. Thomas: We withdraw the question.

Q. Do you know whether or not Josiah G. Davis was a Notary Public? A. He was at that time.

Q. That is the same Josiah G. Davis to whom you subsequently assigned an eighth interest? A. Yes sir.

Q. And who had an interest in the lease? A. Yes sir.

Q. Well, now, after the lease was executed and delivered—at least, after the lease was executed, in pursuance to the prior agreement had between you and Josiah G. Davis, you did assign an eighth interest to Mr. Davis, didn't you?

A. Yes sir.

Q. Do you know whether Josiah G. Davis paid any consideration for that eighth interest?

A. I cannot say, positively.

Q. Did he pay you any consideration for the assignment?

A. No sir.

Q. Prior to the execution and delivery to you of this lease from Edmond McKay and Perry McKay, and their wives, did you have any agreement relative to an assignment of any interest in this lease by G. B. Harmon? A. Yes sir.

Q. What was the interest in the lease that was to be assigned to Harmon? A. Three-eighths, I think.

Q. Did you make an assignment to him of the three-eighths after the execution and delivery of the lease? A. I did.

Q. Did you make that assignment in pursuance to the agreement you had prior to the execution and delivery of the lease?

A. Yes sir.

Q. Did Mr. Harmon pay you any consideration for the assignment of that three-eighths? A. No sir.

Q. How long have you been interested in oil and gas leases in the Creek Nation? A. Six months.

Q. Six months from now? A. Before that time.

Q. Along, then, in the Spring of 1906? A. Yes sir.

Q. Are you familiar with the contents and substance of the Secretary of the Interior's rules and regulations relative to the taking, filing, and perfecting of leases on the lands in the Creek Nation?

A. I usually have an attorney to prepare such papers.

Q. Well, have you a pretty good knowledge of the contents of his rules and regulations, that is all—

A. A fair knowledge, yes sir.

Q. How long have you had a knowledge of the contents of the Secretary's rules and regulations relating to oil and gas leases in the Creek Nation?

A. Oh, I would say a year.

166 Q. Before that time, did you know that a lease—a Departmental lease, had to be filed with the Indian Agent?

A. Yes sir.

Q. When did you first know that? A. Well—

Q. In the spring of 1906, did you know that? A. Yes sir.

Q. Well, you knew that all oil and gas leases, except commercial leases, had to be filed with the Indian Agent, within thirty days from the time they were taken, didn't you?

A. Yes sir.

Q. You knew that along in the spring of 1906?
A. Well, I cannot say that I did at that time.
Q. Well, when did you first know that Departmental leases had to be filed with the Agent within thirty days from the date of their execution?
A. Well, I know I had a lease that I failed to file within that time.
Q. When was that?
A. Well, I can't state unless I look up the lease.
Q. You knew that Departmental leases had to be filed with the Agent before Davis had his lease executed to you?
A. Well, I was familiar—
Q. You were familiar at that time? A. Yes sir.
Q. With the general rules and regulations. When this, the lease from McKay to you was taken? A. Yes sir.

Re-direct Examination

By Mr. Ramsey:

Q. Now, Mr. Reese, you say that you assigned Joe Davis a one-eighth interest and G. B. Harmon three-eighths interest; how much were you out for your one-half in that lease?
A. Four hundred dollars.
Q. Now, have you taken many Departmental leases in the Creek Nation? A. Not individually, I haven't.
Q. Why didn't you go to the Indian Agent's office and examine to see whether there was any lease on this land before you took this lease?

Mr. Thomas: We object to that as incompetent and immaterial.

A. Well, for the reason that Mr. Davis was taking this lease.
Q. Did you give the matter any of your personal attention?
A. At the time this lease was taken, I asked Mr. Davis if he was sure that the title was good, and he said that he was, and he showed me a letter at that time that he had received from an abstracter, stating that there was no lease.

Mr. Thomas: We object to what Mr. Davis—

Mr. Ramsey: Let him get through.

A. —of record at Sapulpa, or at the Indian Agent's office; that is the only interest I had in regard to the title.

Mr. Thomas: We ask that that part of the answer that gives the statements of Mr. Davis to Mr. Reese be excluded from the record, for the reason that the same is incompetent, and that it is hearsay.

167 Q. Now, before you paid the four hundred dollars, did you make that inquiry of Davis as to whether he had investigated the title or not? A. No sir.

Q. When did you make that inquiry?

A. At the time I made the assignment.

Q. Now, then, what was the statement Davis made to you about the abstracter?

A. He showed me a letter from the abstracter.

Q. Did Davis tell you the result of his investigation about the title whether it was clear of any leases, departmental or otherwise? A. He claimed he was satisfied.

Mr. Thomas: Objected to as incompetent and hearsay.

Q. Didn't you rely upon Davis' statement in regard to the matter? A. Yes sir.

Mr. Thomas: Object to that question and answer and ask that the same be stricken, as incompetent and immaterial.

Mr. Ramsey: Put there all questions Mr. Thomas objects to are because it is incompetent and irrelevant, and immaterial.

Mr. Thomas: And leading.

Q. Now, how did you pay that four hundred dollars, that you paid?

A. I believe that it was charged to my account in the bank.

Q. You had an account in Davis' bank?

A. Yes sir, the Bank of Mounds.

Q. Had Davis charged you up with that at the time you were informed that the lease had been executed to you?

A. Yes sir.

Q. Did you agree to that charge and close up the transaction with Davis? A. Yes sir.

Q. And then you were out four hundred dollars for half interest in the lease? A. Yes sir.

Re-cross Examination

By Mr. Thomas:

Q. Josiah G. Davis showed you this letter from the abstracter at the time you went down there and made this assignment, did he? A. Yes sir.

Q. And he told you then he had looked it up?

A. He merely stated that it was his opinion that the title was clear.

Witness dismissed.

168 Sapulpa, Oklahoma, February 10, 1908, at the office of Messrs. McDougal & Wood, attorneys, further evidence in this cause is taken, with following appearances:

For the complainant, C. L. Thomas;

For the defendants, George S. Ramsey.

Eugene McElwane, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Thomas:

Q. Mr. McIlwane, will you state your name, age, and place of residence?

A. Eugene McIlwane; age, forty-six; Independence, Kansas.

Q. What is your occupation, Mr. McIlwane?

A. Oil and gas well supply business.

Q. Do you know Albert W. Shulthis? A. I do.

Q. Do you know George Franklin Berryhill? A. I do.

Q. State whether or not you were present on March 24th, 1906, when George Franklin Berryhill signed and executed an oil and gas lease to Albert W. Shulthis, covering Lot 5 of Section 6, and the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East? A. I was.

Q. Where were you when George Franklin Berryhill signed that lease? A. In lawyer Jackson's office, at Sapulpa.

Q. State whether or not anything was said at that time as to who was the lessee in this lease? A. Yes sir.

Q. What was said?

A. It was stated to Mr. Berryhill, of course that the lease was being taken for Albert W. Shulthis.

Q. Do you know what consideration was paid to George Franklin Berryhill and Clemintine Berryhill for this lease?

A. Yes sir.

Q. What was it? A. One hundred dollars.

Q. Who paid that hundred dollars? A. I did.

Q. How did you pay it? A. By check.

Q. Did the check ever come back to you? A. Yes sir.

Q. Was it endorsed by George Franklin Berryhill's name?

A. Yes sir.

Cross Examination

By Mr. Ramsey:

Q. Did you explain to George Franklin Berryhill and Clemintine Berryhill that the lease made to Albert W. Shulthis would be no good or no effect or validity unless approved by the Secretary of the Interior? A. Yes sir.

Witness dismissed.

169 John Chaney, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Thomas:

Q. State your name, age, and place of residence.

A. John Chaney; Sapulpa; fifty.

Q. Have you been sworn as a witness? A. Yes sir.

Q. What is your occupation, Mr. Chaney?

A. I am in the oil business; taking leases.

Q. Are you acquainted with Albert W. Shulthis?

A. Yes sir.

Q. Are you acquainted with George Berryhill—George Franklin Berryhill and Clemintine Berryhill? A. Yes sir.

Q. State whether or not you were present on the 24th day of March 1906, when George Franklin Berryhill and Clemintine Berryhill executed an oil and gas lease on Lot 5, Section 6, and the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East, the lease being executed to Mr. Shulthis?

A. Yes sir.

Q. State whether or not the lease was read over to George Franklin Berryhill and Clemintine Berryhill? A. Yes sir.

Q. Was the name of the lessee in the [least] at the time it was read to them? A. Yes sir.

Q. Who read the lease over to George Franklin Berryhill?

A. Mr. Jackson, first.

Q. Where was that?

A. That was in Jackson's office over the First National Bank.

Q. Who read the lease over to Clemintine Berryhill?

A. Judge Butterworth.

Q. Of Tulsa? A. Yes sir.

Q. Judge C. W. Butterworth? A. Yes sir.

Q. He the man who at that time was United States Commissioner? A. Yes sir.

Q. Where was that Judge Butterworth read the lease over to Clemintine Berryhill?

A. At a little house out here by the Creek, about a mile and half.

Q. Is that where they were living at that time?

A. Yes sir, and he read that over carefully to them, both sides; we were out there, I suppose, an hour and half.

Q. Did he or did he not state at that time that the lease was made to Albert W. Shulthis? A. Yes sir.

Q. Do you know what the consideration for that lease was?

A. One hundred dollars.

Q. Do you know whether George Franklin Berryhill and Clemintine Berryhill got the hundred dollars?

A. Yes sir, I went with Frank to cash the check.

Q. George Franklin Berryhill? A. Yes sir.

Q. Did he get the money? A. Yes sir.

Q. Did George Franklin Berryhill or Clemintine Berryhill, either of them, or anyone for them ever pay or offer to pay

that hundred dollars, or any part of it, to you or anyone for you? A. No sir.

Q. Have you seen Frank Berryhill since the execution of that lease? A. Yes sir.

Q. State whether you ever went to him to get any papers from him in connection with this lease?

A. Yes sir, I went several times to get the proof of heirship.

Q. Did you get it? A. Yes sir.

Q. Did you get the proof? A. Yes sir.

170 Q. From Franklin Berryhill?

A. No. I got it from—I don't remember the names, now; we took two proofs.

Q. State [whther] or not it was Snyder?

A. Snyder, yes sir—over at Stone Bluff.

Q. You state that George Franklin Berryhill didn't make any proof; why didn't he?

A. I can't tell why he didn't; he promised always to; at that time he promised, on Thursday after they signed up the papers, that he would make the proof.

Q. You made more than one attempt, did you, to get him to sign up these proofs?

A. I made four trips to Stone Bluff, and I don't know how many out to his house.

Q. He refused to sign? A. Yes sir.

Q. Did he ever give any reason for not signing?

A. Yes, he said he didn't want to sign until he got rid of something else he had done on the place.

Q. Did he say what the something else was?

A. He said he sold the land.

Cross Examination

By Mr. Ramsey:

Q. That hundred dollars you paid him was a bonus?

A. Yes sir.

Q. The proof of heirship was an affidavit upon a form prescribed by the Secretary of the Interior, requiring in cases where the lessor leases the lands inherited by him that he make an affidavit showing that he was the heir? A. Yes sir.

Q. Now, that was the affidavit you were trying to get George Franklin Berryhill to make? A. Yes sir.

Q. That affidavit is an affidavit required by the rules of the Secretary? A. Yes sir.

Q. And it has to be made on the form prescribed by the Secretary, that is correct, isn't it? A. Yes sir.

Q. Now, you went to him in October, 1906, to get him to sign?

A. I don't remember the dates, exactly, unless I look; I got the book with the expenses down on it.

Q. To refresh your recollection, you testified on the hearing regarding this matter before the Indian Agent, didn't you?

A. Yes sir.

Q. That was about March 20th, 1907, wasn't it?

A. Yes sir.

Q. I will ask you, to refresh your recollection, if at that time you testified, if you didn't say you had gone to see George Franklin Berryhill in February, 1907, to get him to sign that proof of heirship?

A. Now, whatever—I could tell exactly if I could go and get my book, what time it was; I think it was about that time.

Q. I have what purports to be a copy of your testimony before the Indian Agent, and this is the question: When was the first time you went to see Mr. Berryhill with the Departmental form of proof of heirship; how long ago. Answer: It was later, something like the middle of October. When? The last time? The 20th of February; he absolutely refused to sign any more papers. One day I saw Mr. Berryhill and asked him to sign it, and he said no, he wouldn't sign any more papers for anybody; said that he had quit signing papers; but, after that, he told me he would sign it. To refresh your recollection, isn't that about the way it occurred? A. Yes sir.

Q. And you now state, as a fact, that you did go to see him in February, 1907, in an effort to get him to sign that departmental form of proof of heirship?

171 A. I think it was about that time, I cannot tell exactly.

Re-direct Examination

By Mr. Thomas:

Q. Mr. Chaney you and Mr. McElwane were acting as agents for Mr. Shilthis, in getting this lease? A. Yes sir.

Mr. Ramsey:

Q. You have taken a good many leases, haven't you?

A. Yes sir.

Q. And you are familiar with the rules and regulations of the Secretary? A. Yes sir.

Mr. Thomas:

Q. State whether or not you ever went to George Franklin Berryhill to get an affidavit showing that Clementeen—C-l-e-m-e-n-t-e-e-n—Berryhill and Clemintine—C-l-e-m-i-n-t-i-n-e—Berryhill were the same persons? A. Yes sir.

Q. Did you get the affidavit? A. I don't remember.

Witness dismissed.

Mr. Thomas: I would like to ask Mr. McElwane a question that I forgot.

Mr. Ramsey: Let him follow there.

Mr. McElwane, recalled:

By Mr. Thomas:

Q. Mr. McElwane state whether Mr. Shulthis reimbursed you for the hundred dollars out, that you paid on this lease? A. He did.

Mr. Ramsey:

Q. Were you the agent for Mr. Shulthis in the taking of that lease? A. I was.

Q. I will ask you if you were directed by Mr. Shulthis to come down here and take that particular lease, or to take leases on lands in a certain locality?

A. I was directed by Mr. Shulthis to take leases within a certain area, in the Western end of the Glenn pool, at that time.

Q. You were not directed by him to take any leases upon this particular piece of land?

A. Not any one particular piece of land, no sir.

Q. You were simply acting under a general direction?

A. On authority from Mr. Shulthis.

Witness dismissed.

172 Testimony Introduced on Behalf of the Defense.

H. H. Adams, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Ramsey:

Q. State your name, age, residence, and occupation.

A. H. H. Adams; age, 36; residence, Sapulpa; occupation, abstracter.

Q. How long have you been residing in Sapulpa?

A. I have been here continuously for eight years.

Q. How long have you been in the abstract business at Sapulpa? A. Since February 23rd, 1903.

Q. Do you know Josiah G. Davis, of Mounds, the present county judge of Creek county? A. Yes sir.

Q. Do you know what occupation Davis was engaged in at Mounds? A. Cashier of a bank.

Q. Was he in that occupation in October, 1906, at Mounds?

A. To the best of my knowledge, he was.

Q. I will ask you to state whether or not you, at the instance of Josiah G. Davis, made any investigation as to the title of the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East, in the Creek Nation, the same being a part of the allotment of Andrew J. Berryhill? A. Yes sir, I did.

Q. When was it you made that investigation of the title?
A. I haven't the dates at hand.
Q. Was it in the fall of 1906, to refresh your recollection?
A. It was, yes sir.
Q. Do you remember whether or not you made an abstract for Davis or at his instance, showing the title to that land?
A. I possibly did; I am not sure. I guess my record will show, but I infer I did.
Q. I will ask you whether or not you made any investigation at the instance of said Davis, as to whether or not there was, at the time you made the investigation, any leases for oil and gas purposes on file at the office of the Indian Agent at Muskogee? A. I did, yes sir.
Q. What was the character of the investigation made by you, Mr. Adams?
A. I called the office and asked them to report to me whether there was a lease filed covering this particular tract of land.
Q. Did you call over the telephone? A. I did, yes sir.
Q. Who did you call at the Agency?
A. I called for Mr. Ford.
Q. Mr. W. D. Ford?
A. W. D. Ford, yes sir, I called for him.
Q. What official position did he at that time occupy at the Indian Agency?
A. I understood that he had charge of the Indian lease department; I don't know that he did, now; that is hearsay with me.
Q. It was your information and understanding that W. D. Ford was in charge of the lease division in the United States Indian Agency at Muskogee? A. Yes sir.

Mr. Thomas: We object to what his understanding was.

173 Q. Did you have a conversation with Mr. Ford, over the telephone, about this land?
A. Well, I don't know whether I talked to Mr. Ford, or not; I called for Mr. Ford.
Q. Did you talk to somebody in the Indian Agent's office?
A. Yes sir.
Q. Did they make any report to you whether there was any lease on this land or not? A. Yes sir.
Q. What was that report?
A. That there was no lease filed—on file.
Q. Did you, or not, then communicate to Josiah G. Davis the result of your investigation? A. I did, yes sir.
Q. What did you tell Davis?
A. I told him there was apparently no lease.
Q. Now, why didn't you go to the Indian Agent's office yourself and investigate the record?

A. I could [—] get to the record, if I had been there.

Q. Why? A. Wouldn't let me.

Q. That is, the officials in charge of the Indian Agent's office—they wouldn't permit you to examine the record?

A. Well, I don't know that they would; I never was there and made the demand to go over the records, but I never was able to get to see anything when I was there.

Mr. Thomas: We object.

Q. I will ask you how you communicated with Josiah G. Davis.

A. Well, it is my recollection that I 'phoned him immediately after getting this report, and then afterwards that I wrote him.

Q. I hand you a letter, dated Sapulpa, Indian Territory, October 13th, 1906, with a printed letterhead, "Fire and Marine Insurance Company; Assets over $4,000,000. Adams & Watchorn, Agents." This letter is addressed to Mr. J. G. Davis, Cashier, Mounds, Indian Territory. Examine this letter and state whether or not you wrote that letter and signed your name to it? A. Yes sir, I did.

Q. Did you or not mail that letter to Mr. Davis?

A. Yes sir, I guess I did.

Q. Is this J. G. Davis, here, the same party as known sometimes as Josiah G. Davis?

A. Yes, I know him as being the same man, yes, sir.

Q. I will ask you to file this letter as Exhibit No. "A" to your testimony in this case.

Mr. Ramsey: State there defendants offer this letter in their behalf as such exhibit.

Q. Mr. Adams, I will ask you to state whether or not upon any other occasion you ever received information from the Indian Agent's office to the effect that there was no lease on lands, pending there for approval, and it afterwards turned out that there was a lease, at that time?

Mr. Thomas: Object to that as incompetent, immaterial, and irrelevant; for the reason that it does not go to prove or disprove any of the issues in this case.

A. You want me to answer that?

174 Q. Yes sir.

A. Yes sir, I have had one other case similar to that, and I am not certain whether I had two.

Q. That is where you were misinformed?

A. Yes sir, I was misinformed.

Mr. Thomas: Object to that question as immaterial, and irrelevant, and does not go to prove or disprove any of the issues in this case.

Q. Mr. Adams in referring to this letter filed as exhibit to your testimony, state whether or not you wrote that letter and mailed it on the day that it bears date.

A. Well, I suppose that I did. I am not certain, but the best of my recollection is that I did.

Cross Examination

By Mr. Thomas:

Q. You say that you called up the Indian Agency by telephone to get this information? A. Yes sir.

Q. You don't say for sure whether you talked to Mr. Ford or not. A. No sir, I don't know.

Q. You don't know whom you talked to? A. No.

Q. What did you ask for, when you telephoned?

A. I asked for a report on this particular tract of land, as to whether or not there was a Departmental lease on file in the office.

Q. Did you just describe the land? A. Yes sir.

Q. Or did you say whose name appeared on the map?

A. I didn't give any names or describe the land.

Q. Or describe the land?

A. Just described the land, yes sir.

Q. Did whoever you talked to repeat the description back to you? A. I don't remember about that.

Q. You can't swear just whether he understood the description rightly or not? A. No sir.

Q. It might have been that he didn't get the right desription?

A. Oh it is possible; I don't remember how that was. It could be possible, I suppose. But I hardly think that I made a mistake in giving the description, as I had the particular description of the land before me at the time I was talking. It was possible I could have made a mistake in calling it and he could have made a mistake in understanding it, of course, but then I don't think so. I wouldn't be apt to, you know, to read it off, you know, and make a mistake, though it is possible that I could have done such a thing.

Re-direct Examination

By Mr. Ramsey:

Q. Had you, or not, formerly or before this time communicated with the Agency by telephone in regard to these matters?

Mr. Thomas: Object to that question as immaterial, incompetent, and irrelevant, and not tending to prove or disprove any of the issues in this case.

175 A. Yes sir, I have had several occasions to call the office as to the reports.

Q. When you did call the office on this particular occasion and talk to somebody there in the office and ask whether there was a lease—Departmental lease on this land or not, what did they say?

A. I don't remember exactly what was said, but I believe the words were "no lease."

Q. I mean, though, when you first called them, is what I want to get at—anything said about holding the 'phone—

A. Yes, I think I was requested to hold the 'phone a minute; I am not very sure they told me—

A. —I think there was.

Q. If you are going to put that in there, I want to say "to refresh his memory, was anything said about holding the 'phone."

A. Wait a minute; I wouldn't say for certain anything was said about that.

Re-cross Examination

By Mr. Thomas:

Q. Now, you stated in your direct examination that they wouldn't allow you to see these records; they would, though, if you would go there, give you information—give you the date of the lease, wouldn't they, and information whether or not there was a lease on the land?

A. Yes, I understand so.

Witness dismissed.

Rufus B. Thompson, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Ramsey:

Q. Mr. Thompson, state your residence and occupation.

A. Live in Sapulpa; practice law.

Q. How long have you practiced law in Sapulpa?

A. Nearly six years.

Q. Do you know anything about the practice in regard to finding out, before March 1st, 1907, whether or not lands in the Creek Nation were leased for mineral purposes on the Departmental—that is, whether you had any experience in trying to ascertain from the Indian Agent's office whether leases for oil and gas purposes on the Departmental form, were there on file for approval by the Secretary? A. Yes sir.

Q. I will ask you to state whether or not you ever made any inquiry from the officials in the Indian Agent's office in regard to whether or not there was a lease there pending for approval of the Secretary of the Interior, for oil and gas purposes? A. Yes sir.

176 Mr. Thomas: We object to that as incompetent, immaterial, and irrelevant; the same does not go to prove or disprove any the issues in this case.

Q. Now, I will ask you to state whether or not you always received accurate information.

Mr. Thomas: Object to that as incompetent, immaterial and irrelevant; and it does not prove or disprove any of the issues.

Q. Read him the question. (Question read)

A. Sometimes I failed to receive any information whatever. They quite frequently refused to give out information unless you were a party to the lease or attorney of record of the lessee or lessor. One particular time, I remember of getting some misinformation with regards to whether a lease was pending on a certain tract of land or not that caused me and another party to expend some money, and we afterwards learned after we bought the lease, there was a lease pending on it, and had been approved there and forwarded to Washington.

Q. Recommended for approval by the Agent?

A. Yes sir, and forwarded to Washington; and they gave us information there was no lease on the land.

Q. How many times did you have experiences of that kind?

Mr. Thomas: Object to that as incompetent, immaterial, and irrelevant.

A. I think two or three times, experiences similar to that

Cross Examination

By Mr. Thomas:

Q. You say you did on one occasion go down there and ask about a lease, whether a particular piece of land was leased or not, and they said they wouldn't tell you?

A. They quite frequently refused to give information to me personally.

Q. Did they say they wouldn't tell you whether or not the land was leased or not?

A. They wouldn't give me any information whatever, and wouldn't allow me to see the papers, if they were there.

Q. Who was it refused to tell you whether a lease was on the particular piece of land or not?

A. Now, I can't tell you that, Mr. Thomas—who they were; I don't know all of those men in that Department. I knew the man in charge of it at that time.—

Q. That is all; you answered the question.

A. I think his name was Ford.

Mr. Thomas: We ask that the latter part of that answer be stricken, as it is not responsive and the record will show that counsel made an attempt to stop the witness.

177 Re-direct Examination

By Mr. Ramsey:

Q. You got any interest in this case, Mr. Thompson?

A. No, none whatever.

Mr. Thomas:

Q. You were at one time attorney for the Kiefer Oil & Gas Co., were you not?

A. I at one time appeared for the Kiefer Oil & Gas Co., in connection with Gibson & Ramsey, to resist an application for a receiver or a restraining order.

Q. It was on the facts involved in this case, was it not?

A. Between some parties over the same tract of land.

Mr. Ramsey:

Q. When was that?

A. It was sometime during the year 1907.

Q. July or June, somewhere along there?

A. Yes sir; before statehood.

Q. I will ask you if you had any connection with the present case, for the Kiefer Oil & Gas Co., pending in the United States Circuit Court? A. No sir, I have not.

Q. Wait a minute; Mr. Thompson, do you know H. H. Adams, the abstracter? A. Yes sir.

Q. Do you know the reputation of Mr. Adams as an abstracter? A. Yes sir.

Q. What is that reputation?

Mr. Thomas: I object to that as incompetent, irrelevant, and it does not prove or disprove any issues in this case.

A. A-number one.

Q. Isn't Adams regarded as a reliable man? A. Yes sir.

Mr. Thomas: Same objection as to the previous question.

Witness dismissed.

Josiah G. Davis, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Ramsey:

Q. State your name, residence and occupation.

A. Josiah G. Davis; Sapulpa, Oklahoma; my official position?

Q. Your occupation at present.

A. Judge of the county court of Creek County.

178 Q. Where were you residing in October, 1906, and what was your occupation at that time?

A. Mounds, Oklahoma; Cashier of the Bank of Mounds.

Q. Do you know Edmond and Perry McKay? A. I do,

Q. Do you know the following described land,—the NE4 of the NW4 of 18, 17, 12, in the Creek Nation, of what was formerly the Indian Territory, the same being a part of the allotment of Andrew J. Berryhill, deceased? A. I do.

Q. Do you know Arthur B. Reese, of Independence, Kansas?

A. Yes sir.

Q. Did you have any business dealings with him in the fall or summer of 1906? A. Yes sir.

Q. What was the business relationship between you and him in October, 1906, along about the 12th and middle?

A. Why, I acted as attorney for him in passing upon titles to lands in the Creek Nation, with reference to taking oil and gas leases.

Q. State whether or not Reese had any money on deposit in the Bank of Mounds, of which you were cashier? A. He did.

Q. Did you, or not, have any authority from Reese to use his money in the obtaining of oil and gas leases? A. Yes sir.

Q. I hand you a paper dated October 12th, 1906, and made by Edmond and Perry McKay, with their wives joining therein, leasing to Arthur B. Reese, of Independence, Kansas, the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East. Examine this paper and state when you first saw it.

A. I saw it on the 12th day of October, 1906, and also two or three days prior thereto.

Q. Who wrote that—filled out the blanks, if you know?

A. I did.

Q. Do you know who represented Reese if anyone, in the obtaining of that lease? A. Yes, sir.

Q. Who? A. I did.

Q. Do you know whether Reese had anything to do, personally, with the negotiation for that lease from the McKays?

A. As far as my knowledge goes, he had nothing whatever to do with it.

Q. This original lease is dated in the first line October 12th, 1906, the acknowledgment dated October 13th, 1906; where were these acknowledgments taken, if you know?

A. My remembrance is that they were taken at Haskell.

Q. Were they taken at Mounds? A. No sir.

Q. How come the acknowledgments to be taken at Haskell, or how come the leases to get over to Haskell?

A. One of the McKays lives near there.

Q. Did one of the McKays take the lease out for it to be acknowledged? A. Yes sir.

Q. This lease says that, Witness that the said party of the first part, for and in consideration of the sum of one dollar, to them in hand well and truly paid by the party of the second part, the receipt of which is hereby acknowledged, and the covenants and agreements hereinafter contained—" etc. I will ask

you to state whether or not there was any consideration paid for that lease other than that named in the lease? A. Yes sir.

Q. How much? A. Seven hundred and ninety-nine dollars.

Q. Seven hundred and ninety-nine dollars paid—whom to?

A. Paid to—I gave—these McKays names, I haven't quite got them distinguished; one of the McKays.

Q. That seven hundred and ninety dollars was paid to either Edmond or Perry McKay? A. Yes sir.

179 Q. Who paid it? A. I did.

Q. State when you paid that seven hundred and ninety-nine dollars, as well as you recollect?

A. Well, it was a week or so after the execution of the lease; after the date in the body of the lease.

Q. Tell whether or not that consideration was agreed upon at the time the lease was made? A. Yes sir, it was.

Q. How did it come about that the consideration wasn't paid on October 12th, or on October 13th, when the lease was acknowledged?

A. The lease and the money were both left in the bank in escrow pending the examination of the title.

Q. Who instituted an investigation as to the title?

A. I did.

Q. Did you investigate the title yourself or through someone else? A. Through someone else.

Q. Tell whom you procured to investigate the title?

A. H. H. Adams, abstracter.

Q. Where was H. H. Adams doing business at that time?

A. Sapulpa.

Q. Was he engaged in the general abstract business?

A. Yes sir.

Q. Had Adams at any time before that investigated titles for you or at your instance? A. Yes sir, numerous times.

Q. Tell whether or not the investigations made by Adams as to titles before this had proved accurate and satisfactory, or inaccurate and unsatisfactory?

Mr. Thomas: Object to that as incompetent, irrelevant, and immaterial, not going to prove or disprove any of the issues in this case.

Q. How about that?

A. They had always proved accurate, without any exception.

Q. Do you remember how you communicated with Adams, instructing him to investigate the title to this land in controversy? A. My remembrance is, by long distance telephone.

Q. Long distance telephone; tell whether or not Adams made any report to you? A. Over the 'phone?

Q. As to the result of his investigation, and, if so, how did he report?

A. My remembrance is he communicated by long distance 'phone first.

Q. Tell whether or not you gave Adams any instructions about investigating the title with respect to Departmental oil and gas leases? A. I did.

Q. Did you expressly direct him to see about that?

A. I did.

Q. Did he make the report in regard to that by telephone?

A. Yes sir.

Q. What did he say?

A. That he had had it examined by the Department at Muskogee, and that there was no oil and gas lease pending there.

Q. Tell whether or not Adams communicated with you afterwards? A. He did.

Q. How?

A. By written certificate, as I required in all cases.

Q. I hand you a letter on the letterhead of Adams and Watchorn, Agents, Sapulpa, Indian Territory, October 13, 1906, addressed to Mr. J. G. Davis, Cashier, Mounds, I. T. This letter has been filed as exhibit "A" to the testimony of Mr. Adams. Examine that letter and say when was the first time you saw that? A. Either the 13th or 14th of October, 1906.

180 Q. Did you receive that in due course of mail?

A. Yes sir.

Q. Is that, or not, the signature of H. H. Adams?

A. It is.

Q. Were you at that time familiar with the signature of Mr. Adams? A. Yes sir.

Q. Now, state whether or not you paid the McKay boys or either of them, seven hundred and ninety-nine dollars before or after receiving that letter from Mr. Adams.

A. After receiving it. The seven hundred and ninety-nine dollars, and the one were all paid at one time. The eight hundred dollars.

Q. What was the one dollar for?

A. As a consideration.

Q. Oh yes; the seven hundred and ninety-nine dollars was the additional consideration, not expressed in the lease?

A. Yes, sir.

Q. Now, on the back of this original lease, dated, Mounds, I. T., tenth month, seventeenth day, nineteen hundred and six, is an assignment of Arthur B. Reese to Josiah G. Davis and G. B. Harmon. The assignment transferring to you a one-eighth undivided interest and G. B. Harmon three-eighth undivided interest. Now explain that assignment, and how it came about.

A. Well, before the lease was taken, it was agreed as to the—as to how the interest should be. Mr. Reese was to have

four-eighths, and Mr. Harmon, three-eighths and myself one-eighth. This assignment was made in accordance therewith, before the lease was sent for record.

Q. How was the four-eighths interest Reese obtained in the lease paid for?

A. Four hundred dollars was charged by me against his account in the bank.

Q. Did Reese have money in the bank there at that time?

A. Yes, sir.

Q. Did you have authority from Reese to use that money in cases of this kind?

A. Yes sir, and in this particular case.

Q. How was the other four hundred dollars paid?

A. Three hundred dollars of it was paid by Mr. Harmon and the other hundred dollars by myself. My best recollection is that it was paid to Mr. McKay in one check. My own personal check of eight hundred dollars.

Q. When did Harmon pay you the three hundred dollars for his part?

A. He paid it before—my remembrance is, he paid it before the lease was taken; deposited there in the bank.

Q. In paying the eight hundred dollars, you used four hundred dollars of Reese's money, three hundred dollars of Harmon's money, and one hundred dollars of your money?

A. Yes, sir.

Q. At the time you took this lease from Edmond and Perry McKay and paid this eight hundred dollars, tell whether or not you had any knowledge or any notice, or any information, or rumor concerning a Departmental lease pending in the Department or the Indian Agent's office against this land, in favor of plaintiff, Albert W. Shulthis.

A. I did not.

Q. Was there any abstract of title submitted to you?

A. No sir. I will state, in that connection, that where I was familiar with the title, I had prepared a certificate like this exhibit A, which we called an oil and gas abstract, merely certifying whether or not there was an oil and gas lease pending either here at Sapulpa or the Indian Agency.

Q. Were you familiar with the title in this case?

A. Yes, sir.

Q. And the only information you desired was information as to whether or not there was a Departmental lease against it?

A. That was all.

Q. Mr. Davis, will you file this original lease, with the acknowledgements and certificates of registration, as exhibit B, to the evidence in this case? A. Yes sir.

181 Mr. Ramsey: Defendant filed original lease in this case as exhibit "B" to their evidence—to identify it.

Cross Examination

By Mr. Thomas:

Q. You knew, didn't you, that at the time that—at this time, that is, in October, 1906, most of the oil and gas leases taken on lands in the Creek Nation were filed in the office of the Indian Agent, didn't you?

A. I knew that most of the leases on Indian lands were filed there, yes sir.

Q. You didn't make any personal investigation at all of this matter? A. I did not.

Q. All you did was to call Mr. Adams up by long distance 'phone and ask him to look this up, and he then called up the Agent by long distance 'phone, and advised you the result by phone?

A. He advised me by 'phone, and then sent this written certificate.

Q. But the lease was executed, wasn't it, prior to the receipt of the written certificate? A. Yes sir.

Q. That is all the investigation you made?

A. Yes sir. The investigation was made by an abstracter, supposed to be more familiar with how to look it up than I would be.

Q. He advised you a short time after this, didn't he, that there was a lease on this land? A. No sir.

Q. You never got any such advice from him? A. No sir.

Q. Didn't you write a letter?

A. I wrote him a letter and in reply to it, he so stated; after I found out there was a lease, I immediately wrote him about it.

Q. Then didn't he write you?

A. Yes sir, in reply to the letter.

Q. Were you present when McKay signed this lease—this lease?

A. I am not sure; my remembrance is that one of them and his wife signed it at Mounds, but possibly not.

Q. Do you remember which one of them—of the McKays it was that you had your negotiations with, or was it both of them?

A. Just one of them; the larger man of the two; I know them both well, but I get their names confused.

Q. Did you make any inquiry from the McKays as to whether there was any oil and gas on this land?

A. I did, yes sir; they told me that there was not.

Mr. Ramsey: Thank you. I forgot to ask him.

Mr. Thomas: Well, I wanted to know.

Q. Was there any consideration passed between you and Mr. Adams for that paper—that report? A. Yes sir.
Q. That you filed here—how much was it?
A. One dollar.
Q. Did you pay that?
A. I did. One dollar was paid for all these oil and gas abstracts; that was the fee in all of them.
Q. Are you sure of the time when Mr. Harmon paid the consideration for his part?
A. No sir, I am not absolutely sure, but the best of my remembrance, it was before the deal was entered into.
182 Q. Then you don't know when that was?
A. No sir, I can't say positively. I could tell by looking up the records there at the bank.

Re-direct Examination

By Mr. Ramsey:
Q. Did Harmon have anything to do with the negotiation for this lease, with the McKays? A. No sir.
Q. Did you represent him entirely in the matter?
A. Yes sir. Just a minute; answer where he said had nothing to do with it, make that—"no, not that I know of."
Q. How long after this lease had been taken by you from the McKays to Reese before you discovered or ascertained that there was a Departmental lease pending in the Agency for approval?
A. I couldn't say for sure; the best of my remembrance, it was some two or three months.
Q. Have you got any interest in this case? A. I have not.
Q. Do you own any stock in the Kiefer Oil & Gas Co.?
A. I do not.
Q. You were at one time connected with the company?
A. Yes sir.
Q. Since that, you have sold out all your interest?
A. Yes sir.

Re-cross Examination

By Mr. Thomas:
Q. When did you sell your interest in the Kiefer Oil & Gas Co.—about when?
A. Just a minute; wait a minute—let me kinder figure on that.

Mr. Ramsey: Sometime in November, wasn't it?

A. Since this financial flurry.
Q. It was about November, 1907?

Mr. Ramsey: November or December, somewhere along there; ain't that your recollection?

A. I declare I am an awful poor hand on dates; November or December.

Q. How much stock of the Kiefer Oil & Gas Co., did you have?

Mr. Ramsey: You mean 1906 or 1907?

A. 1907, yes.

Mr. Ramsey: Put it 1907.

Q. How much stock of the Kiefer Oil and Gas Co. did you own? A. I declare—the records will show.

Q. It was a thousand dollars worth of stock, wasn't it?

183 A. I suppose the records would be the best evidence in this matter.

Q. We have been trying to get the records of the Kiefer Oil & Gas Co. ever since this case started, and haven't been able to get them. Well, whatever amount you had, you received that stock in consideration of your assigning your interest in this lease to the Kiefer Oil and Gas Co.—that is right, wasn't it?

A. It was incorporated, and the stock—some of it, was afterwards assigned, in order to figure the whole thing out; I don't remember now just how it was.

Q. The idea is this, you didn't pay any cash in the Kiefer Oil and Gas Co., did you?

A. I think I did, at the time, it was reorganized and afterwards paid up.

Q. You know how much?—Well, the first issue of stock was made when these various assignments were made to the Kiefer Oil & Gas Co., in consideration of these assignments, you just received stock back?

A. I think we figured the lease eight thousand, and there was ten thousand paid up.

Q. You received a thousand dollars worth of stock for the assignment of your eighth—that is your recollection?

A. That wouldn't figure it out, would it?

Q. There would be eight eighths in it, if the lease was turned in at eight thousand.

A. Yes, but there was ten thousand paid up.

Q. You don't remember whether you paid any cash or not?

A. I was to receive a thousand dollars for my eighth interest; that much is correct; when it was finally adjusted.

Q. That thousand dollars would be a thousand dollars in stock of the Kiefer Oil & Gas Co.? A. Yes sir.

Witness dismissed.

D. A. McDougal, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Ramsey:

Q. State your residence and occupation.

A. I reside at Sapulpa and I am a lawyer.

Q. Are you one of the defendants in this case? A. I am.

Q. Have you had any experience with the Indian Agency at Muskogee in regard to the investigation of land titles with a view of determining whether or not there were any leases there pending for oil and gas purposes for the approval of the Secretary? A. Yes sir.

Q. Well, whom would you approach at the agency to ascertain about that?

A. Well, I don't know. No one in particular; I would go to the lease department, and there were a number of gentlemen at work in there, all of whom were strangers to me, except Mr. Ford. I would just ask the first one that happened to come to wait on me.

Q. Did they have what they called a "lease division" there?

A. Yes sir.

Q. That had matters in charge? A. Yes sir.

Q. Now, in making inquiry there at the lease division of the Indian Agent's office, in regard to whether or not there was pending oil and gas leases against lands in the
184 Creek Nation for approval of the Secretary, state whether or not you ever was misinformed about the pendency of a lease?

Mr. Thomas: Object to that as incompetent, immaterial, and irrelevant, and not going to prove or disprove any issues in this case.

A. Why, I don't know that I could state any particular instance where I was misinformed. I know I have gone there on several occasions to inquire as to leases, and I was always met with the question if I was the attorney for either of the parties; that they could not give me any information unless I represented one of the parties to the lease, and I have, on different occasions, been denied any information at all in regard to leases.

Q. Now, was that before or after—

A. I am not quite through yet.

Q. Go ahead, then.

A. My recollection is on one occasion—probably more than one occasion—I was informed that there was no lease on lands enquired about and afterwards learned that there was a lease on said lands, but I don't just now recall.

Q. To refresh your recollection, I will ask you to state whether or not, acting upon information from the agency that there was no lease pending against the piece of land, you took a lease and it was disapproved by the Secretary for the reason that there was a prior lease?

Mr. Thomas: Object to that as incompetent, immaterial, and irrelevant, for the reason it does not go to prove or disprove any issues in this case.

A. The Ricks Oil Company, of which I was a stockholder and attorney, took a lease on the lands of Kaka Karney, and my present recollection is that we made enquiry at the Indian Agent's office before taking the lease, and were informed that there was no lease on the land; our lease was afterwards disapproved, and we were notified that there was a prior lease on the land.

Q. Do you know this land in controversy in this case?

[—] I have been on it.

Q. Did you know the state of development, for oil and gas purposes, in the vicinity of this land in October, 1906?

A. Not definitely; I remember that I executed a lease on forty acres of land in section seven, 17, 12, I think it was in October, 1906; I am quite sure it was that my lease was executed; and I think development was nearer my land at that time than it was to the land in controversy in this case; I received a bonus of forty dollars per acre and thought I had made a splendid bargain.

Q. How many acres was there in that? A. Forty acres.

Q. Tell whether you ever heard complaint among attorneys and oil men about the information given out by the Indian Agent's officials?

Mr. Thomas: We object to that as incompetent, irrelevant, and immaterial, and does not prove or disprove any of the issues.

A. I have, frequently.

185 Q. What was the nature of that complaint?

Mr. Thomas: The same objection.

A. They complained that they were denied information, except where it was shown that they represented one of the parties to the lease, and the complaint was also made that the information that was given out was—couldn't be relied upon. That it wasn't always accurate.

Q. When they did give the information, to what extent did they go in giving the information?

A. Why, I don't know what I could say, definitely; my rec-

ollection is that they would tell you that there was or wasn't a lease on a certain tract of land, and probably give you the date of its execution, but they wouldn't let you see the papers or examine them.

Q. Would they tell you who the lessee was?

A. I think I remember that they have refused to tell me who the lessee was in cases where I was not attorney for either party.

Cross Examination

By Mr. Thomas:

Q. Who made the enquiry you testified about, for the Ricks Oil Company?

A. Why I suppose the Secretary did; I think we had a letter from the Agent.

Q. You don't know absolutely, of your own knowledge, about these facts, do you, with reference to the enquiry made for the Ricks Oil Co.—it was just what was reported to you by the officers of your company, wasn't it?

A. I wouldn't swear positively, but I think I have seen the letter; it is a matter of recollection with me now.

Q. You saw what letter—the letter stating that the lease was disapproved?

A. That there was no lease on the land.

Q. But you didn't make the enquiry yourself?

A. Not that I remember; I don't think I did.

Q. Who was it down there at the Agency that refused to give you any information whatever about the leases?

A. I couldn't say.

Q. It wasn't Mr. Ford, was it?

A. Why, I am not sure; I have, on more than one occasion, been denied any information at all, because I didn't represent either the lessor or lessee.

Q. Well, did Mr. Ford, the head of the lease division, ever refuse?

A. Why, I can't say. He may have or it may have been other parties. I don't know.

Q. Do you recall any particular lease that they refused to give you any information whatever on?

A. I don't think I do now.

Q. You just have a kind of general recollection of going there and asking about a lease and somebody in there refusing the information?

A. I have a very positive and distinct recollection of making enquiries at the lease department on more than one occasion and being refused any information at all.

Q. But you don't remember—

A. For the reason that I didn't represent either the lessor or the lessee.

Q. But you don't have any idea—recollection, who it was refused you? A. I don't know.

Q. Might have been one of the janitors there in the hall?

186 A. I am sure it was not a janitor; it was some of the gentlemen who were at work and handling the books and records in the lease department.

Q. But you can't remember any particular lease?

A. I remember on one occasion that Mr. Mars, an attorney of Supulpa, requested me to get some information in regard to a lease for a client of his as I was going to Muskogee. The information he wanted was to find out who was drawing the—who was getting the royalty on a certain lease; I don't remember now, the description of the land, or the name of the party. I stepped into the lease department and enquired if I could —enquired with regard to this lease and they asked me if I represented either of the parties; I told them that I didn't—that I was acting for Mr. Mars, who was attorney for one of the parties; they wouldn't give me any information or let me see any of the papers.

Mr. Thomas: Now, complainant asks that the answer be stricken as not responsive and not answering the question propounded.

A. Read the question again, please—I will try to answer it.

Q. I will ask it over. Can you give a description of any piece of land as to which you enquired about at the lease division of the agency, and whereon information was refused?

A. I cannot.

Q. That is all.

A. I want to add to that—I frequently made enquiries in regard to certain lands that I wanted to take a lease on, and sometimes in making these enquiries, I would be asked if I represented either of the parties, and on other occasions when I enquired in regard to leases that I knew were in existence, or supposed to be, I was not given any information unless I answered that I represented one of the parties.

Mr. Thomas: Complainant asks that all except the first sentence of the answer to the preceding question be stricken, for the reason that the same is not responsive to the question.

Q. Mr. McDougal, you are one of the defendants in this case, are you? A. Yes sir.

Q. And you claim a twenty per cent royalty under a lease held by the Kiefer Oil & Gas Co., do you not?

A. I have a contract to that effect, yes sir.

Re-direct Examination

By Mr. Ramsey:

Q. When was this that you made these enquiries, what year?

A. Why, at different times, for the last two or three years.

Q. Well, was it before or after Congress made the records constructive notice on March, 1907?

A. Well, I have made these inquiries both before and since. I have been denied the privilege of examining leases since then, except where I was an attorney and representing one of the parties.

Witness dismissed.

187 Joseph O. Denton, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Ramsey:

Q. State your name? A. Joseph O. Denton.

Q. Your residence and occupation?

A. I am cashier in the Creek Bank and Trust Co., assistant cashier; assistant cashier.

Q. You reside in Tulsa? A. Sapulpa.

Q. Have you taken any leases on the Departmental form or leased land in the Creek Nation for oil and gas purposes?

A. Yes sir.

Q. Tell whether or not you ever made any inquiry at the lease division at the Indian Agency, at Muskogee, as to whether or not there was pending a lease for mineral purposes against any particular piece of land.

A. Yes sir, I made inquiries by 'phone and by mail, and then went in person.

Q. Tell whether or not you were always correctly informed as to whether the land you enquired about was encumbered by Departmental lease, then on file in the agency, for the approval of the Secretary?

Mr. Thomas: Object to that as incompetent, irrelevant, and immaterial; does not go to prove or disprove any issue in the case.

Q. Answer the question?

O. Well, if I understand it, I made inquiry in regard to a lease; what is called the Sanna lease down there, 160 acres, deceased land. And they told me, by 'phone and by mail—Mr. Hughes and I were partners—that there was nothing against it. I went there Monday morning, I don't know what day of the month or what month—about nine o'clock, and some man there—I supposed he kept the books—someone told me he was; and he looked it up and told me there was no lease against the land—oil and gas lease.

Q. Where did you go and ask somebody about that?

A. In that big building there where the Indian Agency is, I suppose.

Q. In some office in the Indian Agency?

A. Yes sir, at the head of the stairs.

Q. Was it in the lease division?

A. Yes sir, that is what I supposed it was; I seen leases there, and they were calling for leases and examining them.

Q. Did they tell you no lease was on the piece of land you were enquiring about?

A. Yes sir, I think the man's name was Eveeretts; I think it was.

Q. What did you do then?

Mr. Thomas: I object to that as incompetent, irrelevant, and immaterial.

Q. Did you take a lease on the land? A. Yes sir.

Q. Did you afterwards learn there was or wasn't a lease on the land?

Mr. Thomas: The same objection.

A. They told me there was, afterwards.

188 Q. After you had taken a lease on the information that there was no lease, then they informed you there was a lease against it?

Mr. Thomas: Object to that as leading.

A. Yes sir.

Q. You got any interest in this lawsuit?

A. None in this one, no sir; I guess not, not as I know of.

Q. You never heard of this case before today?

A. No sir, only what experience I had in it, is all.

Q. Just being sworn as a witness? A. Just now, yes sir.

Cross Examination

By Mr. Thomas:

Q. You don't know what position that fellow had you asked down there, do you?

A. Well, he was under—what is the Indian Agent's name?

Mr. Ramsey: Kelsey.

A. I went to see Mr. Kelsey and he came in there and gave this man a jacking-up for misinforming me.

Q. The man you got the information from, you don't know who he was? A. No sir.

Q. All that you know is that he was employed at the agency?

A. Yes, just working there.

Re-direct Examination

By Mr. Ramsey:

Q. Did you hear Mr. Kelsey, the agent, get after this man about the—

A. Yes sir, I went in Mr. Kelsey's office and explained this proposition, and he gave this fellow a jackingup; I told Mr. Kelsey that didn't do me any good; that I lost about ninety-three dollars.

Re-cross Examination

By Mr. Thomas:

Q. Mr. Kelsey told you they always gave that information —you had a right to that information, and it should be given to you correctly?

A. I don't know whether he did or not; I explained the proposition to him and he talked to this fellow.

Q. That he should have given you that correctly?

A. I wouldn't say for certain; I know he jacked him up, and he said such a thing had happened before, and he told me, I believe himself, that he had fired—

Mr. Thomas: That is all.

189 Re-direct Examination

By Mr. Ramsey:

Q. What was it you said Kelsey said to this fellow about other mistakes like that?

Mr. Thomas: We object to that as incompetent, irrelevant, and hearsay.

Q. Go ahead and tell.

A. He told me he said I have fired some six or eight men on cases like this, and said it is almost impossible to get a man to do the thing correct; and he give him a talking to about it, was about all. I told him that didn't get my ninety-three dollars back. And he told me if he could give me any accommodation, he would do it. That is about all I could get out of him.

Witness dismissed.

This is all the evidence that is offered at this time.

190 Muskogee, Oklahoma, February 12, 1908: At the office of Messrs. Thomas & DeMuels, further evidence in this cause is taken, with same appearances as of February 3rd, 1908, as follows:

G. B. Harmon, being first duly sworn, upon examination, testified as follows:

Direct Examination

By Mr. Ramsey:

Q. State your age, residence, and occupation.

A. I am forty-four, past.

Q. Occupation and residence?

A. I am an oil producer at Mounds.

Q. Are you familiar with the land in controversy, the NE¼ of the NW¼ of Section 18, 17, 12, in the Creek Nation?

A. Yes sir.

Q. Part of the land of the Berryhill allotment?

A. Yes sir.

Q. Are there or not any operations on said land for oil and gas purposes? A. Yes sir.

Q. Do you know when the first operations was had on this land for oil and gas purposes?

A. Now, the exact—what do you mean—the time they started the first well?

Q. Yes.

A. Well, sir, now I can't give that exact date.

Q. Well, about?

A. Without going back and looking it up; commenced there the last of April sometime.

Q. In April, 1907? A. Yes sir.

Q. Was there any wells on this land for oil and gas purposes before April, 1907? A. No sir.

Q. Do you know Josiah G. Davis? A. Yes sir.

Q. I hand you an instrument which is a lease from Edmond and Perry McKay, with their wives joining therein, to Arthur B. Reese, of Independence, Kansas, covering the NE¼ of the NW¼ of Section 18, Township 17 North, Range 12 East, in the Creek Nation, said lease being filed as defendant's exhibit "B" to their evidence in this cause; on the back of this lease there is an assignment by Arthur B. Reese, dated Mounds, Indian Territory, tenth month, seventeenth day, nineteen [—] and six, by which he assigned one-eighth undivided interest to Josiah G. Davis, and a three-eighths undivided interest to G. B. Harmon. Examine this lease and tell when, if you remember, was the first time you saw that instrument.

A. Now, for the exact dates of that, I won't be positive, but I can find out the exact date that I saw the lease first by seeing John J. Wertsel; he gave me a check where I had paid for my interest in that lease that day, and I will tell you a little more about that lease now—

Q. Well, I will ask you a question and get that in. Are you the same G. B. Harmon mentioned in this assignment?

A. Yes sir.

Q. How much did you pay for that three-eighths undivided interest, if anything? A. Three hundred dollars.

Q. Whom did you pay that three hundred to?

A. Joe Davis.

Q. Tell whether or not there was any understanding between you and Joe Davis about the obtaining of this lease before you paid that three hundred dollars?

A. After he got the lease from—when he was talking of getting the lease from McKay, I told him to find out if the title was all right, and I would trust to his judgment on the lease; if the title was alright, to find out, and if it was, I would take the lease. And the time I gave him three
191 hundred dollars, he showed me a letter from the abstracter—this man Adams, at Sapulpa, saying he had examined the records and there wasn't anything against the lease. That it was absolutely all right, and I took it. It was just a gamble at the time; wasn't anything near it to make it look good or bad, and I took it. That was all there was to it.

Q. Did you have any negotiations in person with the McKays about this lease?

A. Never seen either one of the McKays, to my knowledge until I was drilling on the wells—to my knowledge; I was just rigging up, wasn't I, when you drove up? That was the first I saw either one.

Q. You say there you told Joe you would take the lease; you mean the whole lease or just a part of it?

A. I wanted half of it at first, and he said I couldn't have half; he wanted an eighth himself and Reese wanted half; and that was all we would let me have, and I paid the three hundred dollars. I paid him three hundred, and Reese paid four hundred, and he paid one hundred himself. That is the way it was stated to me.

Q. Did you personally at that time make any investigation yourself as to whether or not this land had been formerly leased?

A. No sir.

Q. Why didn't you make an investigation yourself in regard to that matter?

A. I depended on Joe Davis for that.

Q. You depended on Joe Davis? A. Yes sir.

Q. That is, Josiah G. Davis? A. Yes sir.

Q. Now, you say that Davis showed you a letter from the abstracter? A. Yes sir.

Q. Do you remember who that abstracter was?

A. I think his name was Adams.

Q. Was it H. H. Adams, of Sapulpa?

A. I think that is the name.

Q. I hand you a letter, which has been heretofore filed as defendant's exhibit "A" to defendant's evidence in this case; said letter having on the letterhead "Adams & Watchorn,

Agents", and signed "H. H. Adams, Abstracter." Examine this letter and state whether that is the letter showed to you by Davis.

A. That is the same thing exactly.

Q. Do you know whether or not you had paid that three hundred dollars to Davis before Davis paid the eight hundred dollars to the McKays?

A. I don't know as to that. I don't think I paid my—the money was all paid in before mine was, because he had the lease made out, and I met him and he called me to come to his house, and he said the other boys paid their money, and it was several days afterwards, and I told him to look up the title before I would pay him, you know. And I paid him that morning. I wouldn't say the exact date, but I could get the exact date from John J. Wetsel.

Q. At the time you paid him the three hundred, did he show you the letter?

A. Yes, before I paid it. The other money was paid Joe four of five days ahead of mine.

Q. Now, I will ask you to state whether or not at the time agreed to take an interest in this lease, and at the time you paid your three hundred dollars, and at the time this assignment was made to you on October 17th, 1906 of the three-eighths interest, you had any knowledge, notice, or information that the plaintiff, Albert W. Shulthis had a Departmental oil and gas lease pending in the Indian Agent's office or before the Department of the Interior, for approval.

A. How long ago?

192 Q. At the time you paid this?

A. Oh no, no; I didn't know there was anything in the world against it; nothing.

Cross Examination

By Mr. Thomas:

Q. When did you first see that lease, you say, Mr. Harmon—the lease from Edmond and Perry McKay to Arthur B. Reese?

A. The exact time, you mean?

Q. About when?

A. Well, now, the lease had been wrote up several days before I ever saw it; I think I went in one night, along six or eight or ten days after he talked to Reese, and made the deal; sometime in a week or ten days.

Q. It was a week or ten days after the lease was taken?

A. Somewheres in that; might have been three or four or five days; I was pretty busy at that time.

Q. Did you ever see the lease before it was filed for record?

A. Yes, I did. The day of the—the lease was sent the same day that I paid my money, to record it, whatever day that was;

we were talking of this lease three weeks before I seen it. I don't know when it was wrote up, so far as that is concerned.

Q. Do you know of your own personal knowledge whether Reese paid anything for his share, or not—that is, of your own personal knowledge?

A. Well, I didn't see Reese pay anything.

Q. All you know is what was told you?

A. They told me the money was in the bank.

Q. Davis, or some of them there? A. Davis, yes.

Q. Have you any stock in the Kiefer Oil & Gas Co.?

A. Yes sir.

Q. How much?

A. Well, I got one—I have got one-fourth of the stock of the company.

Q. Now, when you—

A. Hasn't all been issued to me yet, but I have got one hundred and eighty-seven shares issued to me now.

Q. One hundred and eighty-seven shares?

A. Yes sir.

Q. You made an assignment, didn't you, of the interest you actually owned—this assignment which is on the back of this lease—to Kiefer Oil & Gas Co? A. Yes sir.

Q. What did you receive for that assignment?

A. I received for that assignment my interest in the company, same as the rest credited with what I had paid in.

Q. The consideration, then, for your assignment to the Kiefer Oil & Gas Co. was paid to you in stock of the Kiefer Oil & Gas Co.?

A. No, we put in our money; at the time of that assignment, we had put in—I forget the exact amount of money; we had put a good deal of money in that lease. We had a well drilled—had started to drill a well, when we organized the company.

Q. Isn't it a fact that the lease was put in to the Kiefer Oil & Gas Co. at eight thousand dollars? A. Yes sir.

Q. And that you received three-eighths of the stock of the Kiefer Oil & Gas Co., in payment for your assignment of your interest to that company—

A. No, that isn't right; I sold half of my three-eighths of that stock to G. W. Barnes, Jr. or Sr., I don't know which.

Q. That left you three-sixteenths? A. Yes sir.

193 Q. Did you sell half of your interest before you got any stock in the Kiefer Oil & Gas Co.?

A. Yes sir, that was the time we organized the Kiefer Oil & Gas Co.

Q. When you assigned the remaining three-sixteenths to the Kiefer Oil & Gas Co., you received in payment of that three-sixteenths of eight thousand dollars in stock, didn't you?

A. That was what I was to have; we didn't get it out at that particular time.

Q. That was the understanding? A. Yes sir.

Q. Has the Kiefer Oil & Gas Co. got any other lease except this one? A. No sir.

Q. That is the only lease, then, is it? A. Yes.

Q. When did you sell that three-sixteenths to Barnes?

A. Now, I can't say as to that.

Q. It was after March 1st, 1907, wasn't it?

A. No; oh no; it was long—it was before that, because it was before we started drilling a well. I can tell by going back to when I drill my No. 1 on the John Pursell. If you got the date when Barnes bought in, I can give you the exact date.

Q. When did you start drilling that first well?

A. Do you remember, Ed. when we started that well? I can't remember it; that is going back quite a good ways; I can't say as to that; when we started. I think it was in April, we started the well.

Q. You have drilled all these wells up there?

A. Drilled six of them, yes sir.

Q. When did you bring in number two on that lease?

A. Number two, let me see; I brought in number two, I think, sometime last month.

Q. The way the men up there on the lease stated to me, the number one well was in the northeast corner of the lease—

A. Yes.

Q. And then you operated your wells over toward the west?

A. Yes.

Q. Along the north line of the lease, and operated them around so that number eight would be south of number one?

A. By going to my books, I can give you when number one come in. Every one, outside of number one, I got the dates of the rest of them; I don't know just when number one came in; we were monkeying with that so long.

Q. Do you know how large these wells are?

A. I know number one is the best one we got.

Q. Will they be better than two hundred barrels?

A. Well, I think the wells will average right close to two hundred barrels; you see, that stuff is falling off mighty fast in there; the last well is not near so good; number seven isn't near so good. Number one, two, three, and four, and seven—let's see; number one, two, three, four, and five, and seven, is all that is drilled.

Q. Which one came in last? A. Number five.

Q. How far did they drill that well into the pay-sand, do you know?

A. They drilled that well forty-five feet in the same.

Q. How much pay-sand?

A. I judge there is about thirty or thirty-five feet; I wasn't

to the well; I never was to the well from the time it started until it was drilled in, and never been to it since.

Q. That pump that is on that lease down there by that creek, that is yours, isn't it? A. No sir.

Q. Who has that, do you know?

A. Captain Terrell.

194 Q. Didn't you sometime in last spring take a good deal of oil out of that creek? A. Yes sir.

Q. About how much, do you remember?

A. Why, I don't know that that is any of your business here.

Q. Now—

A. That was a deal I made with McKay on that land; that wasn't taking oil out of that lease; it was off the creek. That ain't got anything to do with this case at all.

Q. Mr. Harmon, have you got a record of your operations on there, where you took the oil off the creek?

A. Took my oil from the creek—

Q. You got a record over there somewhere?

A. I sold tanks; had tanks filled and sold them.

Q. I mean, have you got a record of it anywhere?

A. Nothing only what I got for the tanks. I had ten sixteen-hundred barrel tanks, and sold them.

Q. How long have you been interested in leases in the Creek Nation?

A. About the first leases I took in the Creek Nation was on the 18th day of last October, year ago last October.

Q. October 1906, was that? A. Yes sir.

Q. You had been operating here in the Creek Nation before that, hadn't you? A. No.

Q. Hadn't done drilling before that?

A. Done some drilling, oh yes.

Q. How long have you been drilling?

A. The first well I drilled was the 29th day of August a year ago last August.

Q. August 1906?

A. Yes. I remember that date because that was the first day I come in the Creek Nation drilling; I was just looking it up the other day.

Q. When did you say you paid this money to Josiah G. Davis?

A. Well now, the date of that I can't tell you right offhand, but I can find it out and give it to you, the exact date.

Q. You don't remember?

A. I suppose somewheres between the 10th and 20th; now, whatever date that lease shows record, was the day I paid that money, for he sent that lease right then to record. I was in there and he put it in an envelope that day and sent it. Whatever date that shows was the date I paid the money. I said

you had better record this now and have it so you will know where it is. And he said I will send it right now. What date does that show?

Q. This is the 18th.

A. Well, that is the [sate], then, I paid the money, because I know they put it in a envelope, unless they waited until the next day to put it on record. That is taxing a man's memory a little too much.

Q. How many times have you seen that letter of Mr. Adams?

A. I never saw it but once before I saw it here.

Q. That was when?

A. When Joe Davis showed it to me; Joe Davis showed me that morning I paid the money for that lease.

Re-direct Examination.

By Mr. Ramsey:

Q. Did the Kiefer Oil & Gas Co. have anything to do with that oil on the creek there?

A. No sir. The Keifer Oil & Gas Co. had nothing to do with it at all; that was a private deal of mine and Mr. McKay's; Mr. Perry McKay.

195 Q. Was that oil there on the creek produced from these wells on this land?

A. Not one quart of it, no sir; not a pint of it. Not a drop of it come from these wells; not one drop—I will make it stronger.

Q. You say that while you do not remember the exact date you paid Joe Davis the three hundred dollars for your three-eighths, you say you paid it on the date he showed you this letter from Adams? A. Yes sir.

Q. I also understand you to say that when you paid the three hundred dollars, why he immediately mailed that lease?

A. To Adams—

Q. To the clerk for record?

A. Yes sir, mailed to the clerk, I supposed for record.

Q. You knew this land in controversy in October, 1906, at the time you took this lease? A. How is that?

Q. You knew this land at that time? A. Why, yes.

Q. Now, state its value for oil and gas purposes, if you know, at that time?

A. At that time it didn't look any good at all; nothing more than just a fair—the nearest well to it at that time was there in section eight.

Q. How far was that well from this land?

A. Well, the well was right about in the center of eight; the first well Rosier drilled; that was the nearest well, is my recollection, on the Holdenville—the well was drilled, I think; also on that forty-acre piece, and that was the nearest thing to

it. Right about the center of section eight, which would be—less see—I can tell you just how far it was, in a second here; about a mile and a half, right about a mile and a half; I afterwards went back to Josiah Davis and tried to get him to sell it to somebody for a tank farm. I didn't think it was any good for oil.

Witness dismissed.

Muskogee, Oklahoma, February 13, 1908.

At the office of Messrs. Thomas & DeMeules, with the same appearances as last noted, further evidence was introduced as follows:

Mr. Ramsey: The defendants file printed copy of the rules and regulations prescribed by the Secretary of the Interior, as amended July 10th, 1903; and makes said rules exhibit No. "C" to defendants' evidence.

Mr. Thomas: To which complainant objects for the reason the said rules and regulations are immaterial, in that they do not go to prove or disprove any of the issues in this case.

The rules and regulations set forth in complainant's bill being admitted are the only ones applicable.

Mr. Ramsey: Defendants do not admit rules set out in the bill are applicable.

Edmond McKay, being first duly sworn, upon examination, testified as follows:

Direct Examination

196 Mr. Ramsey:

Q. State your age, residence and occupation?

A. Age, 37; residence, Haskell, Oklahoma; occupation, farmer.

Q. Did you reside in the Indian Territory before it become part of the State of Oklahoma, by admission into the Union?

A. Yes sir.

Q. How long have you resided in the Indian Territory?

A. Since 1894.

Q. Continuously? A. Yes sir.

Q. Do you know George Franklin Berryhill, the father of Andrew J. Berryhill, deceased, a part of whose land is in controversy in this case? A. Yes sir.

Q. Are you the Edmond McKay that is a party defendant in this case? A. Yes sir.

Q. There is on file, as exhibit A to defendants' answer in this case, a deed executed by George Franklin Berryhill and Clemintine Berryhill, on June 5th, 1906, conveying to yourself,

Edmond McKay, and to Perry McKay this land in controversy, with other lands; now I want you tell who negotiated for the purchase of this land, covered by this deed?

A. Myself and brother.

Q. Did you and your brother, Perry McKay, both negotiate with George Franklin Berryhill and Clemintine Berryhill?

A. Yes sir.

Q. Was there any price agreed upon per acre for the NE4 of the NW4 of Section 18; this forty acres in controversy in this case? A. No sir.

Q. The consideration mentioned in the deed was two thousand dollars; was that the payment for all the land described in the deed? A. Yes sir.

Q. Now, I will ask you to state what inquiry, if any, you made from George Franklin Berryhill, in regard to the title to this forty acres, in respect to encumbrances or any leases?

A. Well, after we had talked to him about the deal and he had made the price on this land, we asked him if there—asked him—I asked him if there was anything against this land, if he had made any kind of deal on this land.

Q. Any kind of deal.

A. If he had signed any papers, and he said no he hadn't, only he had signed an old lease sometime ago, but it wasn't any good, he said he knew, because the parties he had signed this lease to had come back after him and wanted him to sign up new papers.

Q. Did he say what kind of new papers the parties had come back and requested him to sign?

A. He said that they said that these papers had been signed up on the wrong forms, or something of that kind. The wrong papers. There was a mistake and they wanted to correct it, and that he hadn't corrected it; that he hadn't done anything, and he knew that this wasn't against the land now, because he hadn't signed nothing more.

Q. Now, did he tell you to whom he had signed any old lease or any prior papers, in regard to this land, or against this land? A. He did not know who it was to.

Q. Did he say that he didn't know who it was to, or didn't remember the name of the lessee?

Mr. Thomas: Object to that as leading.

A. The reason, I think, he didn't know; he said he had signed papers to somebody, and he didn't name the party.

197 Q. Did you ask him the name of the party?

A. Yes sir, but that was the way he answered it, that he didn't—it was to somebody.

Q. Did George Franklin Berryhill say he didn't remember the name of the party to whom he had signed these former papers, or the former lease?

Mr. Thomas: Object to that question as leading.

Q. Now, you can answer that yes or no.

A. I don't remember that he said the exact words, but he never did know the name; if I ever asked him that question direct.

Q. Did George Franklin Berryhill tell you at the time you negotiated for the purchase of this land or at any time in the month of June, 1906, that he had made any lease to the plaintiff, Albert W. Shulthis? A. No sir, he didn't.

Mr. Thomas: Complainant objects to that question as leading.

Q. Did George Franklin Berryhill, at any time during the negotiations for the purchase of this land, or at any time during the month of June, 1906, tell you he had made a lease for oil and gas purposes, to a man by the name of McIlwane?

A. No sir, he didn't.

Mr. Thomas: We object to that question as leading.

Q. Tell whether or not there was anything said by George Franklin Berryhill at the time you bought this land, accepted the deed therefor, and paid the consideration, in regard to a Departmental oil and gas lease having been formerly made to anybody?

Mr. Thomas: Complainant objects to that as leading.

Q. Answer it.

A. There was certainly nothing said about any Department lease.

Q. How much of this two thousand dollars, if any, was paid at the time the deed was made and delivered?

A. There was four hundred dollars paid.

Q. How did you pay that four hundred dollars?

A. We give him a check that we had with us for two hundred and eighty-five and a hundred and fifteen dollars check on the International Bank at Haskell.

Q. Who was the check for $285.00 on?

A. It was a check to my brother from Tom Adams, I believe.

Q. Well, who was the hundred and fifteen dollar check on?

A. It was given by us on the International Bank at Haskell.

Q. Given by you and your brother? A. Yes sir.

Q. Have you got that check?

A. Yes sir, I believe I have got it here with me.

Q. Produce it please. How did it happen that you and your brother didn't pay the whole two thousand dollars' consideration at the time the deed was made?

A. We told him—after he said, intimated there might be something against this land, by telling us about his having once given some kind of papers—signed some kind of papers, we told him we would have an abstract made, and we would see whether there was anything against this land or not.

198 Q. Did you have an abstract made? A. Yes sir.

Q. Who made the abstract for you?

A. Lafe Speer, at Sapulpa.

Q. Was he an abstracter? A. Yes sir.

Q. At whose instance did Lafe Speer make this abstract?

A. At ours.

Q. You and your brother's? A. Yes sir.

Q. Now, was there anything in that abstract showing or indicating that there was any lease on this land, for oil and gas purposes? A. There was not.

Q. Was there anything in that abstract showing that Shulthis had a lease? A. No sir.

Q. Now, when did you pay the balance of the consideration, the sixteen hundred dollars?

A. On the 13th day of that month.

Q. The 13th day of June, 1906? A. Yes sir.

Q. Now, was that before or after you got the abstract?

A. After we got the abstract.

Q. How did you pay that sixteen hundred dollars?

A. I placed it to the credit of George Franklin Berryhill, at the International Bank, at Haskell; which he requested we do; placed it there and got a certificate of deposit, which I delivered to him; sixteen hundred dollars.

Q. How did you make that deposit at the International Bank?

A. I drew a check to the International Bank, which I have here.

Q. Have you got the check? A. Yes sir.

Q. Is this it? A. Yes sir.

Q. Haskell, Indian Territory, June 13th, 1906—

A. And I wrote on the check, also myself, what the check was for, when I signed it.

Q. This check is payable to the International Bank.

A. Yes, sir.

Q. And signed by you and your brother, and you deposited that in the bank to the credit of George Franklin Berryhill?

A. Yes, sir.

Mr. Ramsey: Defendants file this check as exhibit "D" to their evidence in this case.

Q. At the time you bought this land from George Franklin Berryhill, accepted this deed, and paid the entire consideration, tell whether or not you had any notice, or any knowledge, or any information that there was outstanding a Departmental oil and gas lease against this land, formerly executed by George Franklin Berryhill and Clemintine Berryhill?

A. No sir, we had no knowledge of it.

Q. Do you know Josiah G. Davis, at Sapulpa, at present, who resided in Mounds, Indian Territory, in 1906?

A. Yes, sir.

Q. There appears on file in this record a lease executed by you and your wife, with Perry McKay and his wife, leasing this forty acres in controversy to Arthur B. Reese, of Independence, Kansas; did you have any negotiations or transactions with Arthur B. Reese in person about this lease?

A. No sir.

Q. Did you have any negotiation yourself with Josiah G. Davis, in regard to this lease? A. No sir.

Q. Well, who represented you and your brother in the leasing of this land to Reese? A. My brother.

Q. That is, Perry McKay? A. Yes sir.

199 Cross Examination

By Mr. Thomas:

Q. That two thousand dollars consideration expressed in that deed from George Franklin Berryhill and Clemintine Berryhill to you and Perry McKay was the consideration for the whole seventy acres covered by the deed, wasn't it?

A. Yes sir.

Q. How much, if any, of that consideration did Clemintine Berryhill get?

Mr. Ramsey: Object to that for the reason that it is not shown that she got any.

A. As far as I know, I don't know what she got.

Q. So far as you know, then, Clemintine Berryhill didn't get any of it? A. Why, no; I don't know what they done with it.

Q. You paid the whole consideration to George Franklin Berryhill? A. Yes sir.

Q. You didn't make any inquiries at all at the Indian Agency as to whether or not there was an oil and gas lease on this land at the time of the execution and delivery of the deed of George Franklin Berryhill and Clemintine Berryhill to you and Perry McKay, did you? A. No sir.

Q. You knew that Departmental leases were filed there, didn't you, filed at the Indian Agency?

A. I had never given that any thought.

Q. You knew that oil and gas leases on the lands of citizens of the Creek Nation, taken on the form of the Secretary of the Interior were filed here with the Indian Agent, didn't you?

A. We wasn't taking any leases, and never had given it any thought.

Q. Didn't you ever hear of any oil and gas leases being filed down there with the Indian Agent?

A. I can't say that I had ever heard of it at that time.

Q. When did you first hear of it, then?

A. About probably six or eight months—something like six or seven or eight months after we had bought this land.

Q. That was the first you knew that oil and gas leases were ever taken on forms prescribed by the Secretary of the Interior?

A. That was the first that I had ever taken any notice of it.

Q. Had you ever been in the Indian Agent's office before this time you took this deed from George Franklin Berryhill and Clemintine Berryhill? A. Yes sir.

Q. Down here in this Indianola Building, its present location?

A. Well, I don't remember just when they moved into the present location.

Q. They moved in along in September 1904, or along that summer. A. In the present location?

Q. Yes. A. Well, I think I had been in it possibly then.

Q. Ever been in the lease division down there? A. No sir.

Q. Where is this abstract that you spoke about?

A. It is supposed to be with the Indian Agent. In the Indian Agent's office.

Q. Do you know whether or not the certificate on that abstract certified there were no leases on file with the Indian Agent? A. No sir, I can't say about that.

Q. George Franklin Berryhill, as a matter of fact, told you that he had executed an oil and gas lease on this land, didn't he, prior to the date of your deed from Berryhill?

A. No sir, not exactly that.

200 Q. He tell you that he had executed a lease on it?

A. That he had signed some kind of papers on it; that is the question I remember asking him—had he signed any kind of papers, had he made any kind of deal on the land.

Q. Didn't he tell you he had executed a lease but that he supposed it was no good? A. Yes sir.

Q. That was about all he said?

A. He assured us—he was very careful to assure us it was no good, because they had come back and asked him to sign papers; said it was wrong and wanted him to sign other papers, and he hadn't signed no other papers.

Q. He said they wanted some additional proof of heirship, didn't he?

A. No sir, he never said nothing about heirship.

Q. He said that in substance?

A. No sir, I never thought of heirship from his talk.

Q. Now, from the date you took your deed, you were advised of the date of the birth of Andrew J. Berryhill and the date of the death of Andrew J. Berryhill, wasn't you?

A. Yes sir, I knew the date of the birth and the date of the death, from knowledge of my own.

Q. And you were acquainted with the family history of the Berryhills—that particular branch of the family—very well, wasn't you? A. Yes sir.

Q. You were at Tulsa on March 20th, 1907, when there was a hearing on a contest over the lease on this land?

A. I think that is about the date.

Q. That was the date. A. Yes sir.

Q. Was it you or your brother that testified up there—made a statement? Well, did you make this statement at that hearing held in Tulsa on March 20th, before Mr. W. D. Ford: Mr. Berryhill told us he had given some kind of a lease, and that they had come back to get new papers just a few days before we bought the land, and that he didn't sign these papers?

A. I think my brother made that statement.

Q. Well, did you make that statement?

A. If I didn't make that statement, I will make it now; I don't remember.

Q. Well, George Franklin Berryhill told you—gave you this information about this lease, that he supposed was no good, before you closed the deal, didn't he—that is, before the deed to you and your brother was executed? A. Yes sir.

Q. You said that you had no personal negotiations whatever with Arthur B. Reese, or Josiah G. Davis, relative to the oil and gas lease that was subsequently made covering this land?

A. Yes sir.

Re-direct Examination

By Mr. Ramsey:

Q. When George Franklin Berryhill, at the time you were negotiating for the purchase of this land, said something about having executed a lease, did he say that the lease he had executed was an oil and gas lease?

Mr. Thomas: Defendant objects to that as leading.

A. No sir.

201 Q. Did he say anything about what kind of a lease the one he referred to as having formerly executed was?

A. No sir.

Q. Now, I will ask you to state whether or not you and your brother or either of you ever operated for oil and gas in the Creek Nation or in the Indian Territory?

A. No sir, never did.

Q. Were you and your brother, at any time during the year 1906, operating in the Creek Nation, or in the Indian Territory, for oil and gas purposes? A. No sir.

Q. Had you ever, at any time? A. No sir, we had not.

Q. Operated for oil and gas in the Creek Nation, or in the Indian Territory? A. No sir we had not.

Q. Tell whether or not you and your brother, or either of you had ever at any time before you bought this land from George Franklin Berryhill, taken any leases for oil and gas purposes on lands in the Indian Territory, on the Departmental form? A. No sir, we never had taken any leases.

Q. Had you or your brother been dealing in any oil leases?

A. Never had.

Q. Had you had any occasion to investigate the rules and regulations of the Secretary of the Interior, in regard to leasing of lands in Indian Territory, for oil and gas purposes, up to the time you bought this land from George Franklin Berryhill? A. No sir.

Q. Did you know anything about the rules and regulations of the Secretary, at the time you bought this land from George Franklin Berryhill and his wife?

A. Never had paid any attention to the rules as to oil and gas or leases or anything of that kind.

Q. Had you ever read the Secretary's rules in regard to leases?

A. I don't remember that I ever did; I don't think I ever had read them.

Q. Do you know now whether you ever read them at all or not? A. Well, I don't believe I ever, even now.

Q. Did you know in June, 1906, at the time you bought this land, that a party, in order to get the approval of the Secretary of the Interior to an oil and gas lease upon alloted lands in the Indian Territory, had to file that lease first with the Indian Agent at Muskogee, before the Secretary of the Interior would act on it? A. No sir.

Re-cross Examination

By Mr. Thomas:

Q. How did you imagine that oil and gas leases were approved by the Secretary if you didn't have to file them down here?

Mr. Ramsey: I object to the imagination.

A. We didn't have any money to invest in oil and gas

leases, and hadn't been bothering with them. Had no imagination about them.

Q. As a matter of fact, you knew that this prior lease, executed by George Franklin Berryhill and Clemintine Berryhill was an oil and gas lease, didn't you?

A. No, he seemed to be anxious—he wanted to sell this land; seemed to think he was getting a fair price which looked like a mighty good price at the time, and he never told us it was an oil and gas lease; some kind of papers; that is what I asked him; it was the sixth of June and restrictions had been removed as to this land, and I thought somebody might have been to him after the restrictions were removed and got him to sign some kind of papers and maybe he didn't know
202 what it was, and after he said he signed some kind of paper, I thought it best to get an abstract to see what kind of paper he signed, and I relied on the abstract and felt confident we had a good, clear title when we got this abstract and looked over it.

Q. Then you mean to say that you never heard of the Secretary's rules and regulations prior to the 5th of June, 1906?

A. Yes sir; that I had never given them any thought or read them with a view of doing any business.

Q. You have been in the land business more or less since you first came to the Territory, haven't you?

A. Well, a good deal of the time since I came to the Territory, there was no land business; we have been in the farming business.

Q. Well, you have taken leases and cultivated the land under leases in the Territory?

A. Oh, we were renting the farms and farming them here in the Territory; done quite a good deal of farming.

Q. Did you have any conversation with Clemintine Berryhill when she signed this deed to you and your brother?

A. No, no particular conversation. She was right there. We were acquainted with her before.

Q. You knew at the time that she had an interest in this land, didn't you, as well as her husband?

A. Well, we was under the impression that the wife of any husband should sign any deed to land that her husband executed in a land sale.

Q. That she had an interest?

A. Yes sir; some kind of an interest; dower, as we had understood it.

Q. Did you know at the time you took this deed that George Franklin Berryhill had other brothers and sisters living? A. Yes sir.

Q. Where was Clemintine Berryhill when she signed this deed? A. At Sapulpa.

Witness dismissed.

Perry McKay, being first duly sworn, upon examination testified as follows:

Direct Examination

By Mr. Ramsey:

Q. State your age, your residence, and occupation?

A. 39; Bixby, I reside; farmer.

Q. Are you the Perry McKay that is one of the defendants in this case? A. Yes sir.

Q. Do you know George Franklin Berryhill and Clemintine Berryhill, who have been mentioned throughout the taking of evidence in this case? A. Yes sir.

Q. Tell whether or not you had anything to do personally with the negotiation for the purchase of this forty acres of land in controversy, and other land, from George Franklin Berryhill and Clemintine Berryhill, on June 5th, 1906?

A. I did.

Q. Were you present at the time the trade was made for the land? A. I was.

Q. Tell what was said by George Franklin Berryhill at that time in regard to there having been formerly made any lease by him and his wife, or either of them, to this land
203 in controversy.

Mr. Thomas: Defendant objects to that question as leading.

Q. Go ahead now.

A. We asked him if he had ever made any deal on his land, or signed any papers of any kind against the land. He first said that he hadn't signed any papers, and then he said, afterwards, that he did sign some kind of papers, but he didn't know who they was to or what they meant; and they came back to him and wanted him to sign them over again, and he wouldn't do this, so we went ahead and bartered with him on this trade.

Q. Was the land in controversy, and what was described in this deed, the land you were enquiring about at the time you were talking to him?

A. Yes sir, that is a part of the land.

Q. Did he know or say he knew the name of the parties to whom he had made any former lease or anything of that kind?

A. He didn't, and I remember of asking him who he had signed papers with, and he said he didn't know.

Q. Did he say anything about the kind of lease, whether it was an oil and gas lease, or oil and gas papers, he had signed?

A. From the way he lead me to believe, I couldn't tell whether he meant it was oil and gas lease, or what it was, that he had signed; I didn't know but what it might be a deed, that he had signed; it was then sometime after the restrictions had been removed from this mixed blood heirs.

Q. Well, how much of the two thousand dollars consideration was paid at the time this deed was executed and delivered on June 5th, 1906? A. How much was paid at that time?

Q. Yes.

A. Well, when we agreed on a trade, we paid him four hundred dollars.

Q. Well, why didn't you pay him the whole two thousand dollars at the time you agreed on the trade?

A. We told him we would get an abstract on the land, and if everything showed up clear, we would take the land at two thousand dollars, and if it didn't show up clear, we didn't want it.

Q. Did you have an abstract made? A. We did.

Q. Did the abstract show any incumbrance or lease on the land, of any character? A. None at all.

Q. After you got the abstract, what did you do then?

A. Paid him the balance of his money.

Q. Now, at that time you paid him the consideration in this case including the four hundred dollars and the sixteen hundred dollars, tell whether or not you had intimation, any knowledge, or information that there had been any former lease for oil and gas purposes executed by George Franklin Berryhill and wife against this forty acres in controversy?

A. We did not.

Q. How long have you lived in the Indian Territory before Statehood? A. About thirteen or fourteen years.

Q. What occupation were you engaged in? A. Farming.

Q. Had you at any time before June 13th, 1906, leased any lands for oil and gas purposes in the Indian Territory?

A. No sir.

Q. Had you taken any Departmental oil and gas leases from any citizens in the Indian Territory? A. No sir.

Q. Had you any time in 1906, or before that, made any investigation as to what the rules and regulations of the Secretary of the Interior was in regard to the oil and gas leases on the lands of allottees in the Creek Nation or the Indian Territory? A. I had not.

204 Q. At the time you and your brother bought this land from George Franklin Berryhill and wife, and took this deed, on June 5th, 1906, and paid the consideration on June 5th and June 13th, did you know anything about the requirements of the Secretary in regard to leasing? A. I did not.

Q. Had you, at the time you closed this trade and paid the

consideration, ever read the rules and regulations of the Secretary of the Interior, in regard to mineral leases? A. No sir.

Q. Did you know what these rules were, at that time?

A. I did not.

Q. Did you, at the time you closed this trade and paid the consideration for the land, know that the lessee, under a Departmental oil and gas lease on allotted lands in the Creek Nation, or any lands in the Indian Territory, had to file that lease first in the office of the United States Indian Agent at Muskogee?

A. I never had paid any attention to oil and gas leases in no way whatever. Didn't know anything about them.

Q. Did you know such leases had to be filed in the Indian Agent's office? A. I did not.

Q. Now, do you know Josiah G. Davis? A. I do.

Q. He is at present county judge of Creek county, isn't he?

A. Yes sir.

Q. Where was Davis residing in October, 1906, if you know?

A. At Mounds.

Q. Mounds, Indian Territory? A. Yes sir.

Q. What occupation was he engaged in at that time?

A. I think he was the cashier of the Bank of Mounds.

Q. Do you know Arthur B. Reese, of Independence, Kansas?

A. I do.

Q. When did you first get acquainted with Reese?

A. I think it was about February or March; about February of 1907.

Q. There is on file in this record an oil and gas lease, dated October 12th, 1906, to Arthur B. Reese, of Independence, Kansas, leasing to him the land in controversy in this case—the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East; the said lease being executed by yourself and wife, and Edmond McKay and his wife. Do you know the negotiation leading up to the execution of this lease? A. Yes sir.

Q. Who represented you and your brother in the transaction? A. I did.

Q. You did? A. Yes sir.

Q. Whom did you deal with in getting this lease on this land? A. Josiah Davis; Josiah G. Davis.

Q. Now, this lease recites a consideration of one dollar and covenants and agreements contained in the lease; was there any other consideration than the one dollars and the covenants in the lease? A. There was other considerations, yes sir.

Q. How much was the other consideration?

A. Eight hundred dollars was the consideration in the lease.

Q. Seven hundred and ninety-nine dollars besides the one dollar mentioned? A. Yes sir.

Q. Was that eight hundred dollars a money consideration?
A. Yes sir, it was.
Q. Was it paid in money? A. It was.
Q. Whom was it paid to? A. It was paid to me.
Q. Who paid it to you? A. Josiah Davis.

205 Q. This lease is dated October 12th, 1906 and was acknowledged on October 13th, 1906; where was the lease acknowledged, if you know?

A. That lease was acknowledged at Haskell.

Q. Haskell, Indian Territory? A. Yes sir.

Q. How did the lease come to be down at Haskell, Indian Territory?

A. Well, I was living nearer Mounds than my brother was, and I was making this trade, and I got the lease and brought it to Haskell, and we all acknowledged it before a Notary at Haskell. I brought it down there for him to sign.

Q. You were living nearer Mounds than your brother?

A. Yes; my brother was living nearer Haskell, and I was living near Mounds.

Q. Now, when was this lease delivered to Josiah G. Davis, if you know?

A. Well, it was some five or six days after it was first turned over to me.

Q. Who wrote this lease, or filled out the [balnks] in it?

A. Josiah Davis.

Q. Were the blanks filled out on the 12th, the date it was dated?

A. Well, I expect it was; about that time; I think it was.

Q. You delivered the lease to Davis? A. Yes sir.

Q. Now, when did Davis pay you the eight hundred dollars?

A. Well, I believe it was about the next day after I delivered him the lease.

Q. Now do you know at the time you made this lease to Reese, through Davis, anything about George Harmon or Davis having any individual interest in the transaction?

A. No sir.

Q. Did you have any personal negotiations or dealings in regard to this lease with either Arthur B. Reese or George Harmon? A. Never did, no sir.

Q. Tell whether or not Davis made any inquiry of you as to the status of the title to this forty acres? A. He did.

Q. What representations, if any, did you make to him in regard to the title?

A. I told him I didn't think there was a thing against the land in any way; and I showed him the abstract and looked it over.

Q. Did you show Davis the abstract that you had had made at the time you bought the land? A. I did.

Q. Do you know whether or not Davis made any investigation on his own hook, in regard to any incumbrances against the land?

A. Well, after I signed up this lease and took it back he said he had made investigation.

Mr. Thomas: Complainant asks that the statement of the witnes, regarding what Davis told him, be stricken, as the same is incompetent, as hearsay.

Q. Did Davis show you any papers or letter, or anything of that kind in regard to the title?

Mr. Thomas: Object to that question as leading.

Q. What did he show you?

A. He showed me a statement from the abstracter.

Q. I hand you a letter filed in this case as defendants' exhibit A, signed by H. H. Adams, and addressed to J. G. Davis, Cashier, Mounds, Indian Territory. Examine this letter and state whether or not you ever saw that letter before.

A. Yes sir Mr. Davis showed this letter to me.

206 Q. Now when did Davis pay you the eight hundred dollars with respect to his showing you that letter?

A. I think it was the same day.

Q. When did you first learn that plaintiff, Albert W. Shulthis, claimed to have a Departmental lease on this land?

A. It was long after this; I think it was in January or or February.

Q. What year? A. Of 1907.

Cross Examination

By Mr. Thomas:

Q. [Pryor] to the time of the execution of this deed from George Franklin Berryhill and Clemintine Berryhill to you and your brother, Edmond McKay, you never made any enquiries at the Indian Agency as to [whwther] there was then pending there an oil and [has] lease covering the lands in controversy, did you? A. No sir.

Q. You state that George Franklin Berryhill told you that he did not know for whom he signed this lease, this prior lease?

A. That is what he told me; that he didn't know who he signed a lease to; he said he signed some kind of papers; he said that they don't amount to nothing, because they come back and wanted to get them signed again.

Q. Did he say what kind of papers they came back to have signed up? A. No, he didn't.

Q. This abstract you spoke about in your examination in

chief, did the certificate on that abstract show that a search had been made for leases in the office and records of the Indian Agency?

A. I don't remember whether it did or not. I looked over the abstract and found nothing against this land.

Q. When did you say that you first heard of Arthur B. Reese? A. When I first heard of him?

Q. Yes. A. When we made this lease.

Q. When did you first know him?

A. I never saw the man, I think, until in January or February after this lease had been made.

Q. This eight hundred dollars that was the sole consideration of this lease, wasn't it? A. Yes sir.

Q. And that was paid some four or five days after the execution and delivery of the lease?

A. It was right soon afterwards; it was after the delivery of this lease, after it was signed up, he paid us the money.

Q. Where was your wife when she signed and acknowledged the lease? A. At Haskell.

Q. Were you paid this eight hundred dollars the day this lease was filed for record?

A. I don't know what day it was filed for record.

Q. The 18th of October.

A. The 18th of October, I had been paid for it on or before that.

Q. When did you first become acquainted with George B. Harmon? A. About April 1907.

Q. You never saw George Harmon before that? A. No sir.

Q. You didn't know that George Harmon had any interest in this lease until that time? A. No, I didn't.

Q. Then you found it out in April 1907?

A. Yes sir, about the time they began drilling that well out there; in April or March; March or April.

207 Q. When you were negotiating with Josiah G. Davis for this lease, did you tell him, or in any way relate to him the conversation, the substance of the conversation had between you and George Franklin Berryhill, relative to these papers that George Franklin Berryhill had signed before the execution of the deed to you and your brother?

A. No sir, I did not.

Q. Didn't say anything to him about that? A. No sir.

Q. Why didn't you?

A. Because I supposed the title was clear, and I supposed if it hadn't been clear, the abstract would have shown it not to have been.

Q. You didn't know what these papers—anything about the nature of these papers that Berryhill had signed, prior to the execution of your deed? A. I did not.

Q. Were you in Tulsa on March 20th, 1907, when they had a hearing on a protest over the Departmental lease, held by plaintiff in this case? A. Yes sir.

Q. Now, on that date, before Mr. Ford and his stenographer and in the presence of the various parties there, didn't you make this voluntary statement: "Mr. Berryhill told us he had given some kind of a lease, and that they had come back to get new papers, just a few days before we bought this land, and that he didn't sign these papers"?

A. Yes. He said yes he had signed up some kind of papers, but we couldn't tell from what he told us whether it was a deed or lease or what it was.

Q. At that same hearing, in reply to questions by me asking you whether he had given some kind of a lease—a Departmental lease—didn't you say: "Didn't say what kind of a lease; probably didn't know; he told us they had come back to get some new papers signed up and that he supposed that the lease was no good"?

A. Yes; he supposed these papers was no good that he had signed.

Q. At the time you took the deed from George Franklin Berryhill and Clemintine Berryhill to you and your brother, in June 1906, covering the land in controversy, you knew the date of the death and the date of the birth of Andrew J. Berryhill, didn't you? A. Yes sir.

Q. You also knew at that time that Clemintine Berryhill had an interest in this land?

A. Didn't know whether she had or not; her being a noncitizen, I was not lawyer, and I couldn't tell.

Q. What part of this consideration that you paid for this deed, if any, did Clemintine Berryhill get?

A. We paid it all to Frank Berryhill.

Q. So far as you know, Clemintine Berryhill didn't get a dollar? A. We didn't know, whether she did or not.

Q. And at the time you were negotiating with Josiah G. Davis, you told him that you didn't think there was anything against the land?

A. Yes, I told him that the abstract showed everything clear, and I thought it was clear.

Q. You state that you saw this letter in evidence in this case as defendant's exhibit "A" to their evidence?

A. I did, yes sir.

Q. That was after the execution and delivery of the lease to Arthur B. Reese?

A. Well, I don't know whether he had delivered the lease to Arthur B. Reese yet or not.

Q. That was after the execution and delivery of the lease to Josiah G. Davis?

A. I think it was the same day we delivered the lease to him.

Q. It was afterwards?

A. At the same time I delivered the lease, he showed me this letter, and after he showed me this letter, we were talking about it.

208 Q. Which took [please] first, the delivery of the lease on your part or the showing of the letter on his part?

A. Well, I believe that he showed me the letter first.

Q. Do you know that for sure?

A. I don't know for sure, but I believe he showed me—

Q. That is just your recollection?

A. It was all the same day, though.

Q. With reference to the time of him showing you that letter—of his showing you that letter, when did you make your representations as to the status of this title?

A. It was before this.

Q. You told him that you didn't think there was anything—no lease on this land before he showed you the letter?

A. I showed him our abstract and I asked him if he could place that lease, and he said he could.

Q. George Harmon never paid you any money, did he, on account of this lease to Reese? A. Never paid it to me, no sir.

Q. Reese never paid you any money, did he? A. No sir.

Q. Never paid you anything? A. How is that?

Q. You never had any transaction at all with Reese?

A. Never knew Reese until long afterwards.

Q. You never heard of the rules and regulations of the Secretary of the Interior, prior to the taking of the deed from George Franklin Berryhill and Clemintine Berryhill?

A. Not as to oil and gas leases.

Q. The fact of the matter, you never heard much of any oil and gas leases in the Indian Territory? A. No sir.

Q. Prior to the execution and delivery of this lease to Arthur B. Reese—that is, prior to the execution and delivery of the lease to Davis, didn't you tell Davis that Berryhill had told you that he had executed some papers relative to a lease on this land? A. I did not.

Witness dismissed.

George S. Ramsey, being duly sworn, states as follows:

Mr. Ramsey: I state that on the cross-examination of George Franklin Berryhill, where the record shows that I read parts of an affidavit and parts of a letter to Dana H. Kelsey, I, in fact, read from the original affidavit which I here file as defendant's exhibit "E", and from certified copy of a letter to Mr. Kelsey, United States Indian Agent, dated March 25, 1907,

which I here file as defendant's exhibit "F". I further state that in reading this affidavit to George Franklin Berryhill and the letter to George Franklin Berryhill, addressed to Mr. Kelsey, that I read them just as they appear by these two exhibits.

Mr. Thomas: Complainant objects to the introduction of exhibits "E" and "F", by counsel for defendants, for the following reasons, and asks that the testimony of the witness be stricken, for the following reasons:

Said Exhibit E is incompetent for the reason that the same is shown by the testimony to be a typewritten affidavit, and the exhibit as offered is mutilated and interlined and no explanation is offered.

209 Muskogee, Oklahoma, February 15, 1908: Further testimony in this cause is taken at this time at the office of Messrs. Thomas & DeMeules; C. L. Thomas appearing for the complainant, and George S. Ramsey, for defendants.

Testimony in Rebuttal on Behalf of the Complainant.

J. I. E. Brasel, being first duly sworn, upon examination, testified as follows:

Direct Examination

By Mr. Thomas:

Q. Will you please state your name, age, and residence and occupation?

A. My name is J. I. E. Brasel; I am thirty-two—will be thirty-two years old in May, and I live in Muskogee.

Q. What is your occupation?

A. I am a clerk in the Indian Agency.

Q. You are a clerk at the Union Indian Agency at Muskogee? A. In the oil and gas division.

Q. What division? A. Oil and gas mining leases.

Q. Is that the division commonly known as the lease division? A. Yes sir.

Q. How long have you been employed in the oil and gas lease division? A. Ever since November 1905.

Q. What have been your duties since the date of your employment there?

A. Well, up till five or six months ago, my duties were to keep a record of the leases on the dockets and give out public information.

Q. Mr. Brasel, prior to March 1st, 1907, if an inquirer would give you the description of a piece of land, in say either the Creek or Cherokee Nation—that is, give you the sub-division of the section and the township, and also the range numbers, and ask you whether or not there was a lease on that—the land covered by that description, what would [you] answer be?

A. Why I would have told him that I could not give it to him in that way.

Q. You were unable to tell whether there was an oil and gas lease on a piece of land to an inquirer who gave you only the description?

A. Couldn't tell him that way; would have to have his name.

Q. The name of who? A. The name of the allottee.

Q. The lessor? A. The lessor, yes sir.

Q. You stated that a part of the time that you have been employed up there, part of your duties were to give out information to the public? A. Yes sir.

Q. Was that—were those duties required of you prior to March 1st, 1907?

A. Yes sir, it has been—since that business got so heavy I had to have a man to help me.

Q. Now, prior to March 1st, 1907, when any information concerning oil and gas leases were required of you, and you gave the information, did you ever make any mistakes that you know of, in giving out the information, as to whether a lease was or was not on a piece of land?

210 A. No, I don't know of any. Of course, if a man gives me the number of the lease, I will give him the description, and it is usually up to him to check the description and see whether this discription covers the land he was looking into. I give him the description off the book, and if he makes a mistake in comparing it, that would be up to him, and I have never had anybody to tell me that I made a mistake in reading a description off the docket; I was always very careful about it.

Cross Examination

By Mr. Ramsey:

Q. You have heard complaint about misinformation being given out there at the lease division, haven't you?

A. Yes, at different times I have.

Q. Parties have complained for the reason that they were misinformed as to whether there was a lease or no lease on a piece of land, at times, haven't they?

A. Yes; I have never known but one or two instances. There have been several cases brought to my mind there, but they nearly always turned out that it was the party's fault that was enquiring. He had the wrong name or something.

Q. Now, Mr. Kelsey has been the Indian Agent for all the times you have mentioned, wasn't he? A. Yes sir.

Q. Hasn't he come over there in the lease division and jacked up some of you fellows about making errors and telling the public wrong whether there was a lease or no lease?

A. Well, once or twice he has since I have been there.

Q. Now, if a man came in there and simply asked you

whether or not a certain piece of land had been formerly leased for oil and gas purposes, describing the land, tell what you would say to him.

A. Well, I would tell him that I couldn't look the records up from a description of the land; I would have to have either the number of the lease or the name of the allottee.

Q. You would voluntarily tell him you would have to know either the number of the lease or the name of the lessor?

A. Yes sir.

Q. You always made that the rule?

A. If he was to ask me from the description of the land alone.

Q. You would inform him right then it would be necessary for you to know the name of the lessor or the number of the lease.

A. Yes sir; but up to that time when they were enquiring about leases, they usually went to another man, because they had to get the number anyway; they very seldom ever came to me first, unless they were strangers.

Q. You wouldn't tell any inquirer that there was or wasn't a lease on a particular piece of land, unless he had first given you the name of the lessor, or the number of the lease?

A. No sir, couldn't do it, unless he would give me the name of the—

Q. You wouldn't give him any information?

A. Not even if I knew from memory that such and such a piece of land was leased, I wouldn't take the chance of telling him that without looking it up.

Q. And you wouldn't tell an enquirer that there was a lease or wasn't a lease unless he first told you either the number of the lease or the name of the lessor?

A. I wouldn't, no sir.

211 Q. You would have to have the name of the lessor or the number of the lease before you would make any positive statement? A. Before I could tell him anything.

Q. Now, that was the rule there in the lease division, wasn't it? A. Yes sir, that is still the rule.

Q. Parties frequently called the lease division over the telephone, didn't they, and asked for this information?

A. Yes, they do; but I didn't very often go to the telephone myself.

Q. Well—

A. They do so, very often; hardly a day passes.

Q. They did that during the year 1906, didn't they?

A. Yes sir.

Q. Information was given out over the phone, wasn't it?

A. Yes sir.

Re-direct Examination

By Mr. Thomas:

Q. Whenever an inquirer came into the lease division and would give you either the number of the lease or the name of the lessor, you would always tell them whether or not there was a lease on this party's land or not, or any part of it?

A. Yes sir, I would read the description of the land, as shown in the docket to him and he would know at a glance whether it was the land or not.

Q. Since the beginning of your employment in the Indian Agency, are you or are you not the clerk who has given out most of the information on oil and gas leases—that is to enquirers who present themselves to the lease division?

A. Well, I gave out the information all the time from November—along about the 1st of December, 1905, up to July 1907; since that, I haven't been giving out very much public information.

Re-cross Examination

By Mr. Ramsey:

Q. Others in that lease division—other clerks gave out information during this period of time that you speak of, didn't they?

A. Yes, occasionally, if they happened to be there and I was out.

Q. Some of them got fired, didn't they by the Indian Agent, for not giving out accurate information?

A. Well, I don't know about that.

Q. Well, the Indian Agent himself, Mr. Kelsey, never undertook to see after that himself, personally, did he?

A. No sir.

Q. He entrusted that to the clerks in the lease division?

A. Yes sir.

Q. That was their business?

A. That was their business.

Witness dismissed.

212 Benjamin Mossman, being first duly sworn, upon examination, testified as follows:

Direct Examination

By Mr. Thomas:

Q. Will you state your name, age, residence, and occupation?

A. Benjamin Mossman; 28 years old, Muskogee; chief clerk, Union Agency.

Q. At what Indian Agency—Union Agency, Muskogee, Oklahoma? A. The Union Agency, Muskogee, Oklahoma.

Q. How long have you acted in the capacity of chief clerk for the Indian Agency at Muskogee? A. Since June 15, 1905.

Q. What was and is the general line of your duties as chief clerk?

A. I have general supervision of the office and act in the Agent's stead in his absence.

Q. Are you or are you not familiar with the books, records and the methods of procedure, and the work of and in the lease division of the Indian agency?

A. The lease division has been entirely remodeled since I have been with the Agent, and I think I can safely state that I am fully conversant with the method of doing business.

Q. Now, during the year 1906, if an enquirer would present himself before some clerk or official who was properly in charge of the lease division, and would make enquiry as to a piece of land in regard to whether or not there was an oil and gas lease on it, and would give the clerk or the official in charge the description of the land, would he or would he not be advised as to whether or not there was a lease on that land?

A. There would be no way of telling whether there was a lease on that particular land or not, unless the name of the lessor, the Indian lessor, was given.

Q. State whether or not if he gave the number of the lease, he would be given that information.

A. Yes, at that time the leases were numbered, and information could have been given from that.

Q. Then if he gave the clerk or the official in charge the number or the name of the lessor, or the name of the allottee, he would be given the information as to whether or not there was a lease on that land?

A. He would be given the information as to whether there was a lease or wasn't a lease; and also whether or not action would be taken on it; other information was withheld.

Q. State whether or not the action of the officials in so giving out information was on the instruction from either you or the agent?

A. Well, it was instructions from both of us; general office instructions.

Cross Examination

By Mr. Ramsey:

Q. You and Mr. Kelsey personally didn't undertake to answer any enquiries as to whether certain lands were leases or not leased for oil and gas purposes, did you?

A. Well, at that time we did; since that time, we have not been so—

Q. When was it you and Kelsey did that personally?

A. Well, during the first—I should say the first eighteen

months or two years I was at the agency, and we used
213 to look up a good many of those things ourselves; didn't trust the clerks to do it.

Q. During the summer of 1906, there was in existence in the Indian Agency a division known as the lease division, was there not? A. Yes sir.

Q. That lease division was at the head of the stairs on the first or second floor, wasn't it?

A. Second floor, extended across the building to the east.

Q. If a party had walked into the lease division at any time during the year 1906, and asked the clerks in charge of the lease division whether a certain piece of land was leased or not leased for oil and gas purposes, what would have been the reply of such clerks, if they had been acting according to instructions?

A. He would have been asked the number of the lease or the name of the Indian lessor.

Q. No information would have been given out unless the enquirer knew the name of the lessor or the number of the lease—that is correct, isn't it? A. That is correct, yes sir.

Q. I will ask you if it isn't a fact that the Secretary of the Interior, during the year 1906, made some criticisms on the agency here because the agency was actually giving out information in regard to leases.

A. Why never to my knowledge, no sir.

Q. There was no record kept in the Indian Agent's office by which you could tell whether a certain piece of land was leased or not leased, unless the number of the lease was given, or the name of the allottee? A. No sir.

Q. That is correct, isn't it? A. Yes sir.

Q. There was no transcript made of a Departmental oil and gas lease filed in the Indian Agency for approval by the Secretary, was there, during the year 1906? That is, a lease filed in the office of the Indian Agent, during the year 1906, for oil and gas purposes, wasn't recorded on any book, or record kept in the Indian Agent's office, was it?

A. Well, the name of the lessor, the name of the lessee, the number given to the lease by the agent, and description of the land, and other—I believe the amount of the bonus paid, was spread upon a docket immediately on filing of the lease, so that it could by that be identified from that record.

Q. That was simply a memorandum record of the names of the parties and description of the land, for the convenience of the office in looking after these leases and recommending the approval or disapproval by the Secretary?

A. Why we considered it an official record, as all information pertaining to that lease we recorded upon this docket.

Q. When a party enquired there as to whether a particular piece of land was leased or not, giving the name of the lessor, he was not given any information as to the action of the Indian Agent in recommending the approval by the Secretary?

A. Well, it depended whether he was an interested party; that is, whether he was attorney for either one of the parties to the lease or the parties themselves.

Q. If a party enquired who was not an attorney in the case, and not a party to the lease, the agency refused to tell him whether there the Indian Agent had recommended the approval or disapproval of the lease—that is true?

A. If he were not a party of record, he would be refused, unless he presented proper evidence showing that he had been authorized by one of the parties to receive this information.

Re-direct Examination

214 By Mr. Thomas:

Q. Now, Mr. Mossman, I want to get just what your lease records there contained: Now, did it contain the date of the lease?

A. Yes sir, the date of the lease, and also the date of the expiration.

Q. Did it contain the names of the parties to the lease?

A. The names of both parties.

Q. Did it contain a description of the land? A. Yes sir.

Q. Did it contain the payment of bonus, if any?

A. When the lease was forwarded to the Department, that was always entered on the records.

Q. Did it contain the action of the Indian Agent and of the Secretary of the Interior, or either of them?

A. It contained every action on the lease, after it was once filed in the office for record.

Q. Now, you stated on cross examination that during the year 1906, or part of the year, I believe, that you gave out some of this information to enquirers. State whether or not you gave, at any time, information as to whether or not there was a lease on a piece of land in response to a telephone communication.

A. Yes, on some occasions both Mr. Kelsey and myself examined the records, and got out the information.

Q. Well, state whether or not you would advise the parties whether or not to consider the telephone communication correct.

Q. We always were very careful to advise parties that the information over the telephone was not official or correct; that if they desired to have us corroborate it by letter, we would do so. That rule is still in force and effect.

Re-cross Examination

By Mr. Ramsey:

Q. Well, couldn't you inform a fellow just as accurately over the telephone as you could by talking to him—verbally, across the counter, in the office? A. No, I think not.

Q. Why not?

A. In the first place, there might be some error in looking up the record, whereas if he was in the office, he could look at the record himself; and in the second place, he might misunderstand it over the telephone, and he couldn't well misunderstand it if you were talking to him.

Q. Isn't it a fact that, during the year 1906, no enquirer, not a party to the lease, or his attorney, was permitted to see any record in the Indian Agent's office, pertaining to a lease?

A. Yes, unless he had some authority from one of the interested parties to a lease.

A. An enquirer, not authorized by some of the parties to act for them, was not permitted to either see the lease, or any of the records pertaining to the lease, during the year 1906—that is correct, is it not?

A. He wouldn't be entitled to examine the papers.

215 Q. You wouldn't show him the record, would you?

A. Well, if you mean the docket, the record, no.

Q. Well that is the only record there was, I reckon. The docket you mention was the record showing the names of the parties, number of the lease and description of the land, etc., you have heretofore talked about? A. Yes.

Q. Now, that docket wasn't shown to enquirers?

A. Well, enquirers such as you have stated, it was not, no.

Q. That is what I am asking about.

A. Enquirers that had no authority.

Re-direct Examination

By Mr. Thomas:

Q. State whether or not, if to your knowledge, an enquirer who gave either the number of a lease or the name of the lessor, was refused information as to whether or not there was a lease on file on the land of that particular lessor?

A. Why no, everybody was entitled to know whether there was a lease on file.

Q. Then if any clerk would refuse that information, he would be acting entirely outside of the line of his duty, would he? A. Yes sir.

Witness dismissed.

W. D. Ford, being first duly sworn, upon examination, testified as follows:

Direct Examination

By Mr. Thomas:

Q. Will you please state your name, age, residence, and occupation?

A. My name is W. D. Ford; I am fifty-four years old; I am a resident of Muskogee, Oklahoma.

Q. What is your occupation, Mr. Ford?

A. I am in the real estate business.

Q. What was your occupation during the year 1906?

A. I was an employee of the United States Indian Agent, at Muskogee, Oklahoma; had charge of the oil and gas lease division.

Q. You were at the head of the oil and gas lease division?

A. Yes sir.

Q. State whether or not you are and were at that time, during the year of 1906, familiar with the methods employed in the lease-division [wieth] reference to the keeping of records and papers with reference to the giving of information?

A. Yes sir.

Q. In respect to oil and gas leases? A. Yes sir.

Q. During that time, would the officials and clerks in charge of the lease division advise an enquirer as to whether or not there was an oil and gas lease on a particular piece of land in the Creek or Cherokee Nation?

A. If they were asked to.

Q. What information would the enquirer have to give to the official in charge or what data would he have to give the official in charge to receive the information as to whether
216 there was an oil and gas lease on file covering any lands in the Creek or Cherokee Nation?

A. Well, you are seeking to show that if a person came there and made enquiry?

Q. Yes, what information—what data would he have to give the official in charge?

A. Well, he would give it to him direct, you know, if I wasn't there. If I was there, prior to March 1st, 1907, he would have told who the lessor was, and the date of the lease, description of the land, and whether it was pending or forwarded. We weren't permitted at that time to tell him who the lessee was or permitted to tell him whether the lease was approved or disapproved.

Q. You say [—] wouldn't advise him whether the lease was approved or disapproved?

A. I think that was the instruction there.

Q. You wouldn't advise him?

A. Oh, yes, we would advise him whether the lease was approved or disapproved, but if the status wasn't settled, we

wouldn't advise him then; but he wasn't, under any consideration, to know the lessees name.

Q. Now, if an enquirer would give to the officer in charge, the sub-division of the section in the township and the range and would ask whether or not there was a lease on the land covered by that description, would the officer in charge advise him as to whether there was a lease on file covering that land? A. Would that be the only enquiry?

Q. Yes sir. A. Just a description of the land?

Q. If the enquirer merely gives the description of the land?

A. We couldn't give him any information, because the indexes are all indexed with the allottees name.

Q. Now, if an enquirer would give the name of the lessor —that is, the name of the allottee, then would he be given the information as to whether or not there was a lease on the land? A. Yes.

Q. If the enquirer would give the number of the lease, would he be given the information as to whether or not there was a lease—could you trace it?

A. Of course that would be knowledge in itself, having the number of the lease. I just want to correct one thing there: Of course these indexes are indexed to the lessors and lessees names; there was no index there at the time I refer to to the land description alone.

Q. That is, they had no set of abstract books up there?

A. No, nothing to the land.

Q. State whether or not you ever, during the year of 1906, and along more particularly the latter part of the year of 1906, responded to a telephone call as to whether or not there was a lease on a particular piece of land?

A. Quite a number; hundreds of them.

Q. Do you know of your ever making a mistake in giving out the information as to whether or not there was a lease on a particular piece of land?

A. Well, I might have made a mistake, while they didn't say anything about it. I remember one particular occasion I made a mistake; about the only one I know of.

Q. How did you happen to make the mistake in that case?

A. Well, Charlie Page asked me over the 'phone, from Tulsa, about an Indian's lands; about an Indian's name—he meant to tell me the Indian's name was Billy, and I asked him half a dozen times, and I couldn't make anything else out of it except Pillie; that cost him four hundred dollars.

Q. You couldn't get the correct name over the 'phone, and that occasioned the mistake?

A. No. That is the only one I know anything about; there might have been others.

217 Cross Examination

By Mr. Ramsey:

Q. I will ask you if some of the clerks in the office there, working with you in the lease-division didn't give out information? A. Oh yes, yes sir.

Q. You don't know how many mistakes they made?

A. No sir, I don't.

Q. Now, the lease-division wouldn't tell an enquirer whether the Indian Agent had recommended the approval or disapproval of a lease pending? A. No sir.

Q. And an enquirer wouldn't be informed as to any of the Department's actions either the Indian Agent's action or the action of the Department at Washington, until the lease had either been approved or disapproved? A. No sir.

Q. You say there was no index kept there by which you could discover whether a particular piece of land was under lease or not leased,—I believe that is what you say?

A. No, there wasn't; would have to have the lessor's name.

Q. Or the number of the lease; now, up until March, 1907, when Congress made the filing of a lease constructive notice, the Indian Agent's office had been refusing to permit any enquirer to examine a lease or see any of the record?

A. Unless it was a party to a lease or the attorney.

Q. An enquirer who was not a party to the lease and not an attorney, wouldn't be permitted before this act of Congress, of March, 1907, to examine any of the papers on file with the lease? A. No sir.

Q. Wouldn't be permitted to see the lease?

A. No sir.

Q. Wouldn't be permitted to see the docket kept by the office there, recording the date of the lease and names of the parties, and so on? A. No sir.

Q. And you were under positive instructions not to divulge the name of the lessee? A. Yes sir.

Q. And you were not permitted to tell to an enquirer whether there was a bonus or no bonus, unless he was a party to the lease or an attorney? A. No sir.

Re-direct Examination

By Mr. Thomas:

Q. Why wouldn't you allow a party not—an enquirer who was not a [partt] to the lease or attorney for one of the parties to examine the lease file and lease papers?

A. Well—and the knowledge of the lessee's name?

Q. Yes.

A. I was told by the agent that was to discourage the protesting of leases.

Re-cross Examination

By Mr. Ramsey:

Q. That information was withheld for the reason that the Department didn't want to be annoyed with any pro-
218 testing, or contesting over the leases?

A. Yes. They claimed there was a great many protests that were framed up that there was nothing in, except—well, there was nothing in it, in fact.

Q. Suppose a man had walked into the lease-division in 1906 and said to you: "I am not attorney for the lessee, and I am not a party to this lease, or to any lease, on a particular tract of land, but Bill Jones, an allottee, told me that he had made a lease on his allotment on a Departmental form, and I have instructions from him to see these papers, and examine them;" would you show them to him?

A. No sir; he would have to produce his authority in writing.

Re-direct Examination

By Mr. Thomas:

Q. Mr. Ford, in the month of October, 1906, did one H. H. Adams, of Sapulpa, that was then Indian Territory, telephone to you and ask you whether or not there was a lease—oil and gas lease on file covering the NE4 of the NW4 of Section 18, Township 17 North, Range 12 East?

A. Not that I know of; I don't remember it.

Q. If Mr. Adams did 'phone you at that time and give you the description of this land, and nothing else, did you advise him—would you have advised him as to whether or not there was a lease on that land? A. Couldn't have did it.

Re-cross Examination

By Mr. Ramsey:

Q. If Adams had called you over the telephone, in October, 1906, and asked you whether or not there was a lease for oil and gas purposes on this land, described by Mr. Thomas, what would [you] reply have been to him?

A. I would have told him that it was impossible that we couldn't give him any information unless he could give me the allottee's name.

Q. Now, you wouldn't have told him, over the 'phone, that there was a lease or no lease, without first obtaining from him the name of the allottee? A. Yes sir.

Q. Then you would say, if you told Adams over the 'phone, either that there was or wasn't a lease, that Mr. Adams had informed you the name of the allottee? A. Yes sir.

By Mr. Thomas: He would have had to 've done that, or you wouldn't have advised him?

A. No sir.

Witness dismissed.

By Mr. Thomas: Now complainant here offers in evidence testimony adduced before the Department of the In-
219 terior, through the United States Indian Agency at Tulsa, on March 20th, 1907, said testimony being taken in the matter of the lease executed by George Franklin Berryhill and Clemintine Berryhill, to Albert W. Shulthis, and as shown by compainant's exhibit "A", to the bill of complaint filed herein.

Mr. Ramsey: Defendant admits that the copy offered is a copy of the stenographic notes of the stenographer taking the testimony in that hearing before Mr. Ford, representative of the Indian Agent, but defendants object to the introduction and admission of this copy of the evidence on said hearing before Ford, as evidence in this case, for the reasons that all the witnesses examined there are living and capable of being introduced as witnesses in this case; and for the reason that the stenographic report of the testimony is not the proper way to show what the witnesses testified on that occasion; and, further, for the reason that what the witnesses on that hearing testified to is not admissible or competent in this case, to prove or disprove any of the issues made under the pleadings.

220 In the United States Circuit Court for the Eastern District of Oklahoma.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil & Gas Co., D. A. McDougal, et al., Defendants.

Certificate of Examiner.

I, Giles A. Penick, the examiner appointed by the Court on the 15th day of January, 1908, to take the testimony of all such witnesses as respective parties desired to offer, and adduce the testimony of such witnesses to writing, as per stipulation of counsel on file in this case, hereby report to the court, in accordance with said order, all the evidence adduced before me as such examiner, including the testimony of witnesses, the agreed statements of fact, and other exhibits, as above shown, and I certify that I correctly transcribed the testimony of said witnesses, from shorthand into longhand, as per agreement of counsel; and I further certify that the above and foregoing is all the evidence introduced by the parties before me, as such examiner, including the agreed statements of fact, the exhibits, and testimony of witnesses.

Counsel for both parties agree on my compensation as such examiner, and fix the same at one hundred and thirty dollars,

which is acceptable to me, and said amount has been paid by the parties, as follows: One-half by the defendants and one-half by complainant.

GILES A. PENICK,
Examiner.

221 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company, Defendants.

Agreed Statement of Facts.

It is agreed by and between the parties to this cause, through their counsel, that the following is a true and correct statement of facts pertaining to the issues in this case, and that the matters of fact covered by this statement shall not be subject to contradiction by other testimony or evidence, and that this agreed statement shall be filed in the record as part of the evidence in this cause and submitted to the Court accordingly. It is agreed that the following are facts, to-wit:

First.

Andrew J. Berryhill, the deceased, mentioned in the pleadings, was born to George Franklin Berryhill, a duly enrolled citizen by blood of the Creek Nation, and Clementine Berryhill, his wife, a non-citizen of the Creek Nation, on May 6, 1901, and died on the.....day of November, 1901.

Second.

That on the 8th day of October, A. D., 1902, the name of the said Andrew J. Berryhill was placed on the Creek
222 Indian Roll, made by the Commission to the Five Civilized Tribes, as a Creek Citizen by blood.

That on April 28, 1904, there was filed by the Commission to the Five Civilized Tribes in the name of Andrew J. Berryhill, deceased, the following described lands, to-wit:

The Northeast Quarter of the Northwest Quarter of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East; and Lot Five (5) of Section Six (6) in Township Seventeen (17) North, Range Twelve (12) East; and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13) Township Seventeen (17) North, Range Twelve (12) East;

in the Creek Nation; the same being shown by certified copies of the records of the said Commission to the Five Civilized Tribes, filed as Exhibits "A", "B", and "C" to this agreed statement of facts, and made a part hereof.

That on December 12, 1902, there was filed by the Commission to The Five Civilized Tribes in the name of Andrew J. Berryhill, deceased, the following described lands, situated in the Creek Nation, to-wit:

Lot One of Section Two, Township Sixteen (16) North, Range Fifteen (15) East, as shown by the records of the said Commission to the Five Civilized Tribes, a certified copy of which is herewith filed as Exhibit "D", and made a part hereof.

Third.

That thereafter, and on the tenth day of October, 1904, a patent was executed by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior on
223 the 31st day of October, 1904, which patent was duly recorded in the records of the Commission to the Five Civilized Tribes. A copy of said patent is hereto attached and made a part of this agreed statement of facts as Exhibit "E".

Thereafter, and on the 10th day of October, 1904, a patent was executed by the Principal Chief of the Creek Nation and approved by the Secretary of the Interior on the 31st day of October, 1904, which patent was duly recorded on the records of the Commission to the Five Civilized Tribes. A copy of said patent is hereto attached and made part of this agreed statement of facts as Exhibit "F".

Fourth.

George Franklin Berryhill, the father of said Andrew J. Berryhill, deceased, was and is a duly enrolled citizen by blood of the Creek Nation, but is a mixed blood Indian, and not a full-blood Indian or citizen of the Creek Nation, as shown by the rolls of citizenship of and for the Creek Nation as made up by the Commission to the Five Civilized Tribes.

Fifth.

Clementine Berryhill, the mother of said Andrew J. Berryhill deceased, is not and never was a citizen of the Creek Nation, and is not and never was enrolled as a citizen of the Creek Nation by the Commission to the Five Civilized Tribes.

Sixth.

On March 24, 1906, George Franklin Berryhill and Clementine Berryhill, as the father and mother of Andrew J. Berry-

hill, deceased, did execute and deliver to the complainant, Albert W. Shulthis, a departmental oil and gas mining lease on

Lot Five of Section Six, and the Northeast Quarter of the Northwest Quarter of Section Eighteen, All in Township Seventeen North, Range Twelve East of the Indian Base
224 and Meridian, containing 80.12 acres.

That on the 21st day of April, 1906, said lease was filed in the office of the United States Indian Agent, at Union Agency, Muskogee, Indian Territory, now Oklahoma; and on the 19th day of April, 1907, was approved by Jesse E. Wilson, Assistant Secretary of the Interior. This lease, with the acknowledgments and endorsements thereon is correctly shown by Exhibit "1" to complainant's bill filed herein, and shall be used in evidence in this case without further proof.

Seventh.

Said departmental oil and gas mining lease to complainant was on May 18, 1907, filed for record in the office of the Clerk of the United States Court and Ex-Officio Recorder for the then existing Western District of the Indian Territory, at Sapulpa, Indian Territory, and recorded in the records of said office in and for the recording district in which the land was then situated.

Eighth.

On the 13th day of May, 1907, complainant paid into the hands of the United States Indian Agent, Dana H. Kelsey, the advance royalty provided for in said lease.

Ninth.

The complainant, Albert W. Shulthis, did, on April 4, 1907, file in the office of the United States Indian Agency, Union Agency, Muskogee, a bond in accordance with the rules and requirements of the Secretary of the Interior, to accompany said lease as mentioned and specified in paragraph 4 in section 6 of the rules and regulations of the Secretary of the Interior in regard to leases. That said bond was duly approved on May 19, 1907, by Jesse E. Wilson, Assistant Secretary of the Interior. Said rules being correctly set out in the
225 complainant's bill in this case. It is here agreed that said rules, as copied into complainant's bill shall be and are hereby treated as evidence in this case without further proof.

Tenth.

For and in consideration of the sum of Two Thousand Dollars in money paid by Edmond McKay and Perry McKay, de-

fendants, to said George Franklin Berryhill and Clementine Berryhill, his wife, they did, on June 5, 1906, execute and deliver to said Edmond McKay and Perry McKay a general warranty deed to

The Northeast Quarter of the Northwest Quarter of Section Eighteen and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen, all in Township Seventeen North, Range Twelve East, in the Creek Nation of the Indian Territory, containing seventy acres more or less.

This deed was filed for record in the office of the United States Court Clerk and Ex-Officio Recorder for the Western District of the Indian Territory, at Sapulpa, Indian Territory, in and for the recording district in which the land is situated and duly recorded in record book 9, page 387. This deed is shown by Exhibit "A" to defendants' answer filed in this case with the acknowledgments and endorsements thereon, and the same shall be used as evidence in this case without further proof.

Eleventh.

On October 12, 1906, said Edmond McKay and Perry McKay, with their wives joining them, did execute and deliver to said Arthur B. Reese an oil and gas mining lease covering the land in controversy in this case. This lease was filed for record in the office of the United States Court Clerk for the Western District of the Indian Territory, at Sapulpa, Indian
226 Territory, as Ex-Officio Recorder, for the recording district in which the land is situated, on October 18, 1906, and duly recorded in book 19, page 132. This lease, with the acknowledgments and endorsements thereon is correctly shown by Exhibit "B" to defendants' answer, and shall be used in evidence in this case without further proof.

Twelfth.

On October 19, 1906, Arthur B. Reese, with his wife, Harriet I. Reese joining therein, did execute and deliver to Albert A. Little, an assignment of an undivided one-eighth interest in and to the said oil and gas lease, shown by Exhibit "B" to defendants' answer, being the lease from Edmond and Perry McKay to Arthur B. Reese. Said assignment was filed for record in the office of the Clerk of the United States Court for the Western District of the Indian Territory, at Sapulpa, Indian Territory, as Ex-Officio Recorder, in and for the recording district in which the land is situated, on October 22, 1906, and re-

corded in book 20. A correct copy of said assignment, with the acknowledgments and endorsements thereon, is shown by Exhibit "C" to defendants' answer and shall be used as evidence in this case without further proof.

Thirteenth.

On November 30, 1906, said Arthur B. Reese did execute and deliver to J. A. Hull, with his wife joining therein, an assignment of an undivided one-fourth interest in and to the oil and gas lease shown by Exhibit "B" to the defendants' answer. This assignment was filed for record in the office of the United States Court Clerk at Sapulpa, Indian Territory, as Ex-Officio Recorder in and for the recording district in which the land is situated, on December 20, 1906, in recording book 20. A correct copy of this assignment is filed as Exhibit "D" to
227 defendants' answer and the same shall be used as evidence in this case without further proof.

Fourteenth.

On April 24, 1907, said Arthur B. Reese did execute and deliver to Bates B. Burnett, an assignment of an undivided one-eighth interest in said oil and gas lease as shown by Exhibit "B" to defendants' answer. Said assignment was filed for record in the office of the Clerk of the United States Court at Sapulpa, Indian Territory, as Ex-Officio Recorder in and for the recording district in which the land is situated on April 24, 1907, in recording book 20. A correct copy of said assignment with the endorsements thereon and acknowledgments is shown by Exhibit "E" to defendants' answer, and the same shall be used as evidence in this case without further proof.

Fifteenth.

On April 24, 1907, the said J. A. Hull did execute and deliver to Bates B. Burnett, an assignment of an undivided one-fourth interest in said oil and gas lease shown by Exhibit "B" to defendants' answer. Said assignment was filed for record in the office of the Clerk of the United States Court in the western District of the Indian Territory at Sapulpa, Indian Territory, as Ex-Officio Recorder, on April 24, 1907, recorded in Book 20. Said assignment with the acknowledgments and endorsements thereon is correctly shown by Exhibit "F" to defendants' answer, and the said exhibit shall be used as evidence in this case without further proof.

Sixteenth.

On April 27, 1907, said Burnett and Davis assigned all their interest in said oil and gas lease shown by Exhibit "B" to de-

fendants' answer to said Kiefer Oil and Gas Company. This assignment, with the acknowledgments and endorse-
228 ments thereon, was filed for record in the office of the United States Court Clerk, as Ex-Officio Recorder, at Sapulpa, Indian Territory, in and for the recording district in which the land was situated, on April 29, 1907, and recorded in Book 24. A true copy of this instrument of assignment is shown by Exhibit "G" to defendants' answer, and said Exhibit "G" shall be used as evidence in this case without further proof.

Seventeenth.

On October 17, 1906, said Arthur B. Reese executed an assignment to Josiah G. Davis covering an undivided one-eighth interest in said oil and gas lease shown by Exhibit "B" to defendants' answer, and also on said date executed to G. B. Harmon an assignment covering an undivided three-eighths interest in said lease shown by Exhibit "B" to defendants' answer. This assignment was made upon the back of the original lease to Arthur B. Reese from Edmond and Perry McKay as shown by Exhibit "B" to defendants' answer, and said assignment to said Josiah G. Davis and G. B. Harmon was placed on record in the recording district in which the land is situated at the same time the original lease was filed for record and recorded, as shown by Exhibit "B" to defendant's answer on October 18, 1906.

Eighteenth.

On April 30, 1907, the said G. B. Harmon did execute and deliver to said G. W. Barnes, Jr., an assignment covering a three-sixteenths interest in the oil and gas lease shown by Exhibit "B" to defendants' answer. Said assignment with the acknowledgments and endorsements thereon was filed for record in the office of the Clerk for the United States Court for the Western District of the Indian Territory, at Sapulpa, In-
dian Territory, as Ex-Officio Recorder on May 27, 1907,
229 and recorded in Book 20.

On April 30, 1907, said George W. Barnes, Jr., did execute an assignment covering said three-sixteenths interest in the lease shown by Exhibit "B" to defendants' answer to George W. Barnes, of Muskogee, Indian Territory. This assignment is shown upon the original assignment made by G. B. Harmon to George W. Barnes, Jr., and was recorded at the same time the original assignment was recorded. This assignment from G. B. Harmon to George W. Barnes, Jr., and the assignment over from George W. Barnes, Jr., to George W. Barnes, are correctly shown by Exhibits "H" and "I" to defendants' answer

and the said Exhibits shall be used as evidence in this case without further proof.

Nineteenth.

On May 13, 1907, said George W. Barnes assigned all his interest in said lease as shown by Exhibit "B" to defendants' answer to defendant Kiefer Oil and Gas Company. Said assignment with all its endorsements thereon and the endorsements of the recording is correctly shown by Exhibit "J" to defendants' answer, and the said Exhibit "J" shall be used as evidence in this case without further proof.

Twentieth.

On May 20, 1907, George B. Harmon, being the G. B. Harmon heretofore mentioned, executed an assignment of a three-sixteenths interest as shown by Exhibit "B" to defendants' answer to the Kiefer Oil and Gas Company. Said assignment with the acknowledgments and endorsements thereon is correctly shown by Exhibit "L No. 1" to defendants' answer, and said Exhibit "L No. 1" shall be used as evidence in this case with the recording of the same, without further proof.

229 Twenty-first.

On July 18, 1907, George W. Barnes assigned all his interest in said lease evidenced by Exhibit "B" to defendants' answer to the Kiefer Oil and Gas Company, as evidenced by Exhibit "K" to the defendants' answer. Said assignment, with the acknowledgment and endorsement of registration shall be taken as evidence in this case without further proof.

Twenty-second.

On June 26, 1907, said Albert A. Little executed and delivered an assignment covering a one-eighth interest in said oil and gas lease as shown by Exhibit "B" to defendants' answer, to the defendant, Kiefer Oil and Gas Company. Said assignment, with the acknowledgment and endorsement of registration thereof is shown by Exhibit "L" to defendants' answer, and said Exhibit "L" shall be taken as evidence in this case without further proof.

Twenty-third.

Said Andrew J. Berryhill, deceased, had no kin or relationship upon his mother's side who were or are duly enrolled citizens of the Creek Nation, the kin and relationship upon his mother's side being non-citizens of the Creek Nation.

Twenty-fourth.

Said Andrew J. Berryhill, deceased, left surviving him no

brothers or sisters or the children or heirs of any brothers or sisters.

Twenty-fifth.

Said Andrew J. Berryhill, deceased, left surviving him the following uncles and aunts, the same being brothers and sisters of his father, George Franlin Berryhill; Martha E. Lee Kiefer; Stanford Berryhill; Columbus Berryhill; Columbus Berryhill; Theodore Berryhill; William Berryhill; May Kiefer and Josie Morton. These uncles and aunts were all of age on or before August 1, 1907. No brother or sister of George Franklin Berryhill is dead.

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Twenty-sixth.

All of the brothers and sisters of said George Franklin Berryhill, the father, executed and delivered, after August 8, 1907, for the considerations therein named, to D. A. McDougal, deeds to the land in controversy in this case, said deeds of conveyance being shown by Exhibits M, N, O, P, Q, R and S to defendants' answer. Said exhibits just mentioned shall be taken as evidence of said deeds by the said makers thereof with the acknowledgments and endorsements and registration certificates thereon without further proof.

Twenty-seventh.

On October 21, 1907, defendant, D. A. McDougal, with his wife joining therein, executed and delivered to defendant, the Kiefer Oil and Gas Company, a certain contract lease for the considerations therein mentioned and the additional sum of five thousand dollars, to be paid in the event the Kiefer Oil and Gas Company is adjudged in this cause the owner of the oil and gas rights in the land in controversy. This lease was filed for record and recorded at Sapulpa, Indian Territory, in the recording district in which the land is situated on October..... 1907. This lease contract is shown by Exhibit "T" to defendants' answer, and said Exhibit "T" shall be taken as evidence of said lease in this case without further proof.

Twenty-eighth.

On October 28, 1907, Edmond and Perry McKay, executed and delivered, for the considerations therein mentioned, to the defendant, Kiefer Oil and Gas Company, a lease contract. This contract was filed for record and recorded in the office of the United States Court Clerk at Sapulpa, Indian Territory, as Ex-Officio Recorder, on the .....day of October, 1907. This Contract is shown by Exhibit "U" to defendants' answer and said Exhibit "U" shall be taken as evidence of said contract without further proof.

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Twenty-ninth.

On the.....day of February, 1907, George Franklin Berryhill filed a written protest against the approval by the Secretary of the Interior of the lease by him and wife of March 24, 1906, to the complainant in this case and relied upon by complainant in this case. Said protest was filed in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory and due notice thereof given to the Secretary of the Interior and to the complainant, Albert W. Shulthis, before March 20th 1907. It being agreed that under the practice in the Interior Department allottees desiring to protest against the approval of departmental oil and gas leases file such protests against the approval by the Secretary in the office of the Indian Agent at Muskogee. Said protest was addressed to Honorable Dana H. Kelsey United States Indian Agent Union Agency Muskogee Indian Territory and is in the following words and figures to-wit:

"2/2/07.

Deas Sir:

I hereby protest against the approval of a certain oil and gas mining lease, executed by myself & wife covering NE ¼ of NW ¼ of 18-17-12 in the Creek Nation, Indian T. being a portion of the allotment of Andrew J. Berryhill, deceased, said lease being dated 3/24/06, to Albert W. Shulthis.

The lessee in said lease, although a sufficient time has elapsed, has not completed the requirements of the Department in order to secure the approval of said lease, & I have sold & transferred said land to Edmond & Perry McKay for a good and valuable consideration.

his
(Signed) G. F. x BERRYHILL.
mark.

(Signed) CLEMENTINE BERRYHILL.

Wit. Lafe Speer.
Ethel Jones"

233 This agreement statement of facts, when signed by counsel for their respective parties shall be delivered to G. A. Penick, the examiner appointed by the Court, and by him filed in the record in this case, as a part of the evidence, and it is agreed that said agreed statement of facts shall not be subject

to variation or alteration upon any other proof, but upon the issues covered by said statement shall be conclusive.

Signed this February 4th, 1908.

C. L. THOMAS,
EDGAR A. DE MEULES,
Counsel for Complainant.
P. C. WEST,
GEO. S. RAMSEY,
234 Counsel for Defendants.

Exhibit "A" to Agreed Statement of Facts.

DEPARTMENT OF THE INTERIOR.

Commissioner to the Five Civilized Tribes

CREEK Nation

Township No. 17 N Range No. 12 E

Sec. 18 Sec.

Andrew J. Berryhill (Decd.)

Filed Apr. 28, 1904 as follows:-
Allotment (Part)
NE4 of NW4 of 18-17-12

This is to certify that I am the officer having custody of the records pertaining to the enrollment of the members of the Choctaw, Chickasaw, Cherokee, Creek and Seminole Tribes of Indians, and the dispositions of the land of said Tribes, and that the above and foregoing is a true and correct copy of the official allotment plat showing a portion of the allotment of Andrew J. Berryhill, Sec. 18 Twp. 17 N. Range 12 E.

J. George Wright
Commissioner to the Five Civilized Tribes.

Muskogee, Oklahoma.
January 30, 1908.

By S.C.Pitts Clerk.

Sec. Sec.

C.B.C.

235 Exhibits "B", "C" and "D" to the Agreed Statement of Facts are omitted by stipulation and agreement of counsel for the parties hereto. Said exhibits are certified plats in all respects similar to Exhibit "A", and show the remainder of the lands, not involved in this cause, allotted in the name of "Andrew J. Berryhill, Deed."

236 Homestead Deed to Heirs. Creek Indian Roll, No. 9622.

Exhibit "E" to Agreed State of Facts.

The Muskogee (Creek) Nation,

Indian Territory.

To All to Whom These Presents Shall Come, Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stat., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as therein provided should be allotted among the citizens of said tribe by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress that each citizen shall select, or have selected for him, from his allotment forty acres of land as a homestead for which he shall have a separate deed; and

Whereas, it was provided by the Act of Congress approved June 30, 1902 (32 Stat., 500), that the homestead of each citizen shall descend to his heirs or be disposed of as therein provided; and

Whereas, The Commission to the Five Civilized Tribes has found that Andrew J. Berryhill, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been selected as a homestead for said Andrew J. Berryhill, and that said lands have been allotted to the heirs of said Andrew J. Berryhill;

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Acts of the Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the heirs of the said Andrew J. Berryhill, deceased, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following described land, viz: Lot Five (5) of Section Six (6) Township Seventeen (17) North and Range Twelve (12) East of the Indian Base and Meridian, in Indian Territory,

containing Forty and 12/100 (40.12) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Acts of Congress.

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 10th day of October, A. D. 1904.

(Seal) P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,

L R S

Approved October 31, 1904.

ETHAN A. HITCHCOCK, Secretary.
By Oliver A. Phelps, Clerk.

Filed for record on the 7 day of Nov., 1904, at 2 o'clock P. M.

Homestead Deed to Heirs. Muskogee (Creek) Nation to ..... Filed for record on the .... day of ....., 190.., at ....o'clock, .. M., and recorded in Book ....., Page .....

237 Department of the Interior, Commissioner to the Five Civilized Tribes. This is to certify that I am the officer having custody of the record of Deeds of the Muskogee (Creek) Nation and that the above and foregoing is a true and correct Copy of the Homestead to Andrew J. Berryhill as the same appears of record in Book B, Page 504 of Homestead Deed Record (to Heirs).

In testimony whereof witness my hand this .... day of ....., 1908.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.

By Wm. T. Martin, Clerk.

Deed Indorsed: Homestead Deed to Heirs. Muskogee (Creek) Nation to Andrew J. Berryhill.

238 Allotment Deed to Heirs. Creek Indian Rill, No. 9622.

Exhibit "F" to agreed Statement of Facts.

The Muskogee (Creek) Nation, Indian Territory.

To All to Whom These Presents Shall Come—Greeting:

Whereas, By the Act of Congress approved March 1, 1901 (31 Stats., 861), agreement ratified by the Creek Nation May 25, 1901, it was provided that all lands of the Muskogee (Creek) Tribe of Indians, in Indian Territory, except as herein provided, should be allotted among the citizens of said tribe

by the United States Commission to the Five Civilized Tribes so as to give to each an equal share of the whole in value, as nearly as may be; and

Whereas, It was provided by said Act of Congress that if a citizen of said tribe has died before receiving his allotment of lands, the lands to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them; and

Whereas, The Commission to the Five Civilized Tribes has found that Andrew J. Berryhill, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been allotted to the heirs of the said Andrew J. Berryhill.

Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of Andrew J. Berryhill, deceased, all right, title, and interest of the Muskogee (Creek) Nation and of all other citizens of said Nation in and to the following-described land, viz: The Northeast Quarter of the Northwest Quarter of Section Eighteen (18) and the East Half of the Northwest Quarter of the Northeast Quarter and the South West Quarter of the Northwest Quarter of the Northeast Quarter of Section Thirteen (13), Township Seventeen (17) North and Range Twelve (12) East, and Lot One (1) of Section Two (2) Township Sixteen (16) North and Range Fifteen (15) East, of the Indian Base and Meridian, in Indian Territory, containing One Hundred and Twenty and 15/100 (120.15) acres, more or less, as the case may be, according to the United States survey thereof, subject, however, to the provisions of said Act of Congress and to the provisions of the Act of Congress approved June 30, 1902 (32 Stat., 500).

In Witness Whereof, I, the Principal Chief of the Muskogee (Creek) Nation, have hereunto set my hand and caused the Great Seal of said Nation to be affixed this 10th day of October, A. D. 1904.

P. PORTER,
Principal Chief of the Muskogee (Creek) Nation.

Department of the Interior,
LRS

Approved Oct. 31, 1904.

(Seal) ETHAN A. HITCHCOCK, Secretary.
By Oliver A. Phelps, Clerk.

Filed for record on the 7 day of Nov. 1904, at 2 o'clock PM.

Allotment Deed to Heirs. Muskogee (Creek) Nation to...
.....
.....
Filed for record on the .... day of ..... 190...., at .... o'clock .... M., and recorded in Book ....., Page .....
Commission to the Five Civilized Tribes.

239 Department of the Interior, Commissioner to the Five Civilized Tribes. This is to certify that I am the officer having custody of the record of Deeds of the Muskogee (Creek) Nation and that the above and foregoing is a true and correct Copy of the Allotment to Andrew J. Berryhill as the same appears of record in Book 2, Page 504 of Allotment Deed Record (to Heirs).

In testimony whereof witness my hand this 16 day of Jan. 1908.

J. G. WRIGHT,
Commissioner to the Five Civilized Tribes.
By Wm. T. Martin, Clerk.

Deed Indorsed: Allotment Deed to Heirs. Muskogee (Creek) Nation to Andrew J. Berryhill.

240 Agreed Statement of Facts Indorsed: No. 1. Eq., Albert W. Shulthis, Complainant vs. D. A. Mac Dougal, et al, Defendants. Agreed Statement of Facts. Filed Feb. 5th, 1908, Giles A. Penick, Examiner. Gibson & Ramsey Muskogee, Ind. Ter. Attorneys for Defendants.

241 In the United States Court for the Eastern District of the State of Oklahoma, sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. MacDougal, Edmond McKay, Perry McKay and Kiefer Oil & Gas Company, Defendants.

Stipulation.

It is stipulated and agreed by all the parties to this cause that in addition to the admissions contained in the pleadings filed herein, and in addition to the statements of fact contained in the agreed statement of facts heretofore filed herein, the additional facts herein set forth shall be taken as true, and are admitted by all of the parties without proof:

That the abstract of title to the lands in controversy in this cause, about which the defendants, Edmond McKay and Perry McKay, testified in this cause on the 13th day of February, 1908, has the following caption:

Abstract of Title.

To the following described real estate situated in the Western district, Indian Territory:

The Northeast Quarter of the Northwest Quarter of Section 18; the East Half of the Northwest Quarter of the Northeast Quarter and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East of the Indian Base and Meridian in Indian Territory, containing 70 acres, more or less, as the case may be, according to the United States Survey thereof.

And the following is a true and correct copy of the certificate of the abstractor attached to said abstract:

242

Certificate.

To Edmond McKay and Perry McKay;

I hereby certify, that after a careful search of the records in the office of the Tax Collector for the incorporated city of Sapulpa, Ind. Ter., I find that there are no taxes due and unpaid, or tax judgments unsatisfied except .... none assessed ..... against the property described in the foregoing caption.

Section 5712 Mansfield's Digest reads as follows:

> Taxes assessed upon real or personal property shall bind the same and be entitled to preferences over all judgments, executions, incumbrances or liens whensoever created, and all taxes assessed shall be a lien upon and bind the property assessed from the first Monday in February of the year in which the assessment shall be made, and shall continue until such taxes, with any penalty that may accrue thereon, shall be paid. Provided, that as between grantor and grantee said lien shall not attach until the first Monday in July in each year.

And after search of the Judgment and Lien Records in the office of the Clerk of the United States District Court for the Western District of the Indian Territory at Sapulpa, we find no judgments, suits pending or liens against any of the within named parties, affecting the title to the property described in the foregoing caption, except ....none indexed .....

That the foregoing sheets numbered 1 to 3 inclusive is a complete abstract of all conveyances or other instruments of writing on file or of record in the office of the Clerk of the

United States Court for the Western District of the Indian Territory at Sapulpa, or at the office of U. S. Clerk at Muskogee prior to February 19th, 1903, or in the office of the
243 Commission to the Five Civilized Tribes (Dawes Commission) affecting the title to

NE ¼ of NW ¼ of Sec 18; the E ½ of NW ¼ of NE ¼ and SW ¼ of NW ¼ of NE ¼ of Sec 13, Twp 17 N Rg 12 East.

Dated this 5th day of June, 1906, at 1 o'clock p. m.

BY LAFE SPEER,
By E. J., Abstractor.

That the foregoing copy of the said caption and the foregoing copy of the said certificate shall be used in evidence in this case, in lieu of the originals, without further proof.

C. L. THOMAS,
EDGAR A. DE MEULES,
Solicitors for Complainant.

P. C. WEST,
GEO. S. RAMSEY,
Solicitors for Defendants.

Stipulation Indorsed: No. 1 Equity. Albert W. Shulthis Complainant, vs. D. A. McDougal, Edmond McKay, Perry McKay and Kiefer Oil & Gas Co., Defts. Stipulation. Filed Feb. 17th, 1908. Giles A. Penick, Examiner. Gibson & Ramsey, Muskogee, Okla., Attorneys for Defendants.

244 Exhibit "A" to Defendant's Proof.

C. H. Bigelow, President, A. W. Perry, Secretary W. S. Timberlake, Treasurer, F. R. Bigelow, Asst. Secretary.

Saint Paul Fire and Marine Indurance Company
Assets over $4,000,000.

Adams & Watchorn
Agents

Sapulpa, Ind. Ter., October 13, 1906.

Mr. J. G. Davis, Cashier,
Mounds, I. T.

Dear Joe:—

Yours 9th reached me this morning with mailing date of the 12th relative to the NE/4 of NW/4 18-17-12.

In reply beg to state that there is no record of an oil and gas lease on the land described either in Departmental form or otherwise up to the date of writing 11.30 a. m.

Very truly,

H. H. ADAMS. Abstractor,

You were correct about the vested title; Edmond & Perry McKay.

245 Exhibit "B" to defendants' proof is omitted by stipulation of counsel for the parties hereto. Said exhibit is the original lease executed by Edmond McKay, Florence McKay, Perry McKay, Gusta McKay and Arthur B. Reese, and is heretofore shown herein by Exhibit "B" to defendants' answer to the bill of complaint.

246 Exhibit "C" to Defendants Proof.

Sec. 4. No lease will be approved for a greater term of years than as follows: Three years for grazing purposes, ten years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, one to be delivered to the lessee, and one to the lessor.

Sec. 5. All leases must accurately describe the lands, specify the rents or royalties and when the same are to be paid, and they must contain a provision to the effect that if the lessee shall fail to pay the rents or royalties or any part thereof when due, or shall fail to faithfully comply with the terms and conditions of the lease, such failure shall constitute a forfeiture of the lease and all improvements placed on the land by the lessee, and that the lessor shall be entitled to immediate possession of the leased lands and the improvements located thereon.

All improvements placed on the lands by the lessee to an agricultural or grazing lease, or anyone holding under him as a sub-lessee, or otherwise, shall, at the expiration of the lease, be and become the property of the owner of the land.

This regulation is also applicable to all improvements and buildings placed upon lands leased for mineral purposes, except tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, casings of all dry or exhausted wells, and machinery.

All original lessees, except of mineral lands as hereinafter provided, shall be required to furnish a bond executed by two or more sufficient sureties, each of whom must justify under oath to an amount equal to the entire rental, guaranteeing the payment of all rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the indenture to be paid and performed by the lessee. Each mineral lease must be accompanied by an application, under oath by the lessee, upon blankds to be furnished by the agent. Each applicant will be required to state that the application is not made for speculation, but in good faith, and

where the lease is for mining purposes, for mining the minerals specified, including oil and natural gas. A map must accompany each application, therein showing the amount of land of each legal subdivision supposed to be underlaid with mineral, oil, or natural gas, as the case may be, and if mineral othern than oil or natural gas, the quantity that can probably be mined. Applicants must furnish such other information as may be desired by the agent regarding their prospective operations. Applications by parties who do not themselves intend to conduct operations on the land will be rejected. Should the application be approved, bond will then be required as provided for hereinafter.

In all mineral leases it must be provided that only so much of the surface of the land described as may be reasonably necessary to carry on the work contemplated may be occupied by the lessee.

All original lessees of mineral lands shall be required to furnish a bond, with two or more sufficient sureties, or a responsible surety company, guaranteeing the payment of all royalties and rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the lease to be paid and performed by the lessee. Suc bond shall be in amount as follows: For leases covering 40 acres and less than 80, $1,000; for those covering 80 acres and less than 120, $1,500; for those covering 120 acres and not more than
247 160, $2,000, and for each 40-acre tract, or fractional part thereof, above 160 acres, an additional amount of $500; but the right is specifically reserved to increase the amount of such bond above the sums named in any particular case where the Secretary of the Interior deems it proper to do so.

No lease shall be sublet, transferred, or assigned without the consent and approval of the Secretary of the Interior.

All mineral leases shall provide for the payment of advanced annual royalty in sums not less than 15 cents per acre per annum for the first and second years, and 75 cents per acre per annum for the fifth and each succeeding year thereafter, for the term for which the lease is to run, the sums thus paid to be a credit on the stipulated royalties should the same exceed in any one year the amount of the advanced payment.

All oil and gas leases shall provide for the payment of a royalty of 10 per cent of the value on the leased premises of all crude oil extracted from said land, to be paid monthly, on or before the 25th day of the month succeeding that in which it is produced, and the average value of the oil during the month in which it is produced shall constitute the criterion for computing the royalty. The royalty on natural gas shall be fixed by the Secretary of the Interior at the end of each year, or oftener in his discretion.

All coal and asphalt leases shall provide for the payment of royalties as follows, to-wit: On asphaltum, the sum of 10 cents per ton for each and every ton of crude asphalt produced weighing 2,000 pounds, or the sum of 60 cents per ton on refined asphalt; on the production of all coal mined, the sum of 8 cents per ton of 2,000 pounds on mine-run, or coal as it is taken from the mines, including what is commonly called "slack." All such royalties shall be paid monthly, as hereinbefore provided for oil and gas.

All mineral lessees must agree to allow the lessor and his agents from time to time to enter upon and into all parts of the leased premises for purposes of inspection, and agree to keep a full and correct account of all their operations and [ma,e] report thereof, under oath, promptly after the end of each month, to the lessor, and to the Secretary of the Interior, through such officers as he may designate, and their books shall be open at all times to the examination of such officers of the Department as shall be instructed in writing by the Secretary of the Interior to make such examination.

The agent, before transmitting a lease, will ascertain whether the lessor or lessors are in fact the parties to whom the land was allotted.

Sec. 6. No person or corporation will be allowed to lease, within the territory occupied by the Creek and Cherokee Nations, for the purpose of mining oil and gas, more than 4,800 acres of land in the aggregate.

Any oil and gas leases presented to the Department must be accompanied by an application by the lessee, for approval of such lease or leases, in the form of an affidavit, showing that the lessee, for approval of such lease or leases, in the form of an affidavit, showing that the lessee is not directly or indirectly [interest] in any oil and gas leases or application for such leases, within the territory occupied by said nations, the land embraced in which, with the tracts covered by the lease or leases presented for approval, would make more than 4,800 acres.

Applications to have leases approved must follow the form on page 22; also the following form:

(Form omitted by agreement of counsel.)

Sec. 7. No lease or deed will be approved that is exe-
248 cuted prior to the approval and delivery of the deed to the allottee. Annexed to these regulations are forms of petition, deed, certificate of officer taking acknowledgment, affidavit of witnesses, grantor's affidavit, grantee's affidivit, certificate of officer who appraised the land, lease, bond and affidavit of surety, which forms must be followed in all cases. All deeds and leases will be transmitted by the Indian Agent, or

other officer in charge, through the proper channels, for the Secretary's approval.

Sec. 8. The post-office address of each party in interest must be given in the instrument which it is sought to have approved, and the post office address of each subscribing witness must appear on the papers.

Sec. 9. A lease or conveyance of undivided inherited lands, or of undivided allotments made directly to the heirs of a deceased citizen, will be approved only in cases where all the heirs join in the lease, deed, or instrument of conveyance.

Sec. 10. If inherited lands, or lands allotted directly to heirs of a deceased citizen, have been partitioned, evidence thereof must accompany a deed or instrument of conveyance of such lands.

Sec. 11. In cases where the lands embraced in a lease, deed, or instrument of conveyance were inherited from one who died after the allotment was made to him, such lease, deed, or instrument of conveyance must be accompanied by a certificate signed by two officials of the town or band of which such allottee was a member, or by two or more reliable members of the tribe, setting forth that the allottee to whom the land was originally allotted is dead, giving as nearly as possible the date of death. Such certificate shall also show the names and ages of the heirs, adults, and minors of such deceased allottee, but the Department reserves the right to require, if in its judgment it shall be considered necessary, such further and additional evidence relative to the heirship as may be deemed proper. If the persons who certify as to the death of the allottee are, from their own knowledge, unable to certify as to who are the heirs (with their names and ages) of such deceased allottee, an additional certificate made by persons of one of the two classes herein specified, showing who are the heirs and giving their names and ages (adults and minors), must be furnished. And one of the certificates above mentioned, or an additional certificate made as above specified, must set forth definitely whether or not any children were born to such deceased allottee after May 25, 1901, and whether or not such deceased allottee disposed of his homestead or any portion of his allotment by will.

Sec. 12. In cases where the lands embraced in a lease, deed, or instrument of conveyance were allotted directly to the heirs of a citizen who died before receiving an allotment such lease, deed, or instrument of conveyance must be accompanied by a certificate signed by two officials of the town or band of which such citizen was a member, or by two or more reliable mem-

bers of the tribe, setting forth the names and ages of the heirs, adults and minors of such deceased citizen, the Department reserving the right to require additional evidence as provided in section eleven hereof.

Sec. 13. If there shall have been, or shall hereafter be, probate or other court proceedings, establishing who are the heirs of such deceased allottee or such deceased citizen, a certified copy of the final order, judgment or decree of the Court showing and determining such heirship must be furnished; but where such court proceedings have not been had a compliance with the requirements of the provisions of sections eleven and twelve hereof, as the case may be, will be deemed sufficient to establish the heirship.

249 Sec. 14. In cases of transfers, leases, and sales to which minors are parties grantor, the transfer, lease, or sale must be made by a guardian, and the lease, deed or instrument of conveyance must be accompanied by certified copies of the proper court appointing the guardian and authorizing him to make such transfer, lease or sale, and it must fully be understood that the Department reserves the right to use any means at its disposal for the purpose of ascertaining whether the consideration given is the fair value of the land, and whether the proposed lease or sale is for the best interests of the Indian.

Sec. 15. Leases for minerals, other than coal, asphalt, oil, and gas, must be made on the form attached hereto, page 42.

W. A. JONES, Commissioner.

Department of the Interior.

Approved July 10, 1903.

Thos. Ryan, Acting Secretary.

250 Exhibit "D" to Defendants' Proof.

Haskel, Ind. Ter. June 13th 1906 No.....

International Bank

Pay to International Bank or Bearer, $1600.00 Sixteen Hundred and No/100 Dollars.

Mc KAY BROS
By Edmond Mc Kay.

(In lead pencil)
to credit Frank Berryhill.

(Stamped) International Bank Paid Jun 13 1906 Haskell Ind. Ter.

251 Exhibit "E" to Defendants' Proof.

United States of America,
Indian Territory,
Western District—ss.

Affidavit of George F. Berryhill.

George F. Berryhill, of lawful age, being by me first duly sworn, according to law, upon his oath deposeth and states that on the fifth (5th) day of June, A. D. 1906, this affiant sold the following land to Perry McKay and Edmond McKay, this affiant and the wife of this affiant, Clemintine Berryhill, executing a warranty deed therefor to the said McKays, to-wit:

The Northeast Quarter (1/4) of the North-West Quarter (1/4) of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian, containing Forty (40) acres, more or less, according to the Government Survey thereof, and being with the Creek Nation, Western District of the Indian Territory.

That this affiant informed the said McKays, that, at the time of the execution of said warranty deed, that, in the opinion of this affiant, there was no oil and gas lease of any kind upon said land. Affiant further states that, prior to the execution of said deed, that he told the said McKays that he and his wife had given some kind of lease papers to one McElwain but that they were of no force or validity and that the said McElwain came to this affiant several times to get said papers properly executed on proper blanks which this affiant refused to do.

Affiant further states that the McKays had an abstract of title prepared before they paid him for said land.

Affiant further states that he never heard of Albert W. Shulthis until long after he and his wife deeded said land as aforesaid to the said McKays; and that the said McElwain represented to this affiant that the lease papers which the said McElwain had this affiant to sign and the others which the said McElwain desired this affiant to sign; were between the said McElwain and this affiant.

Witnesses (Shel Moss
Witness to (
Mark (H. T. Elliff

his
GEORGE F. X BERRYHILL.
mark

Subscribed and sworn to before me on this 15th day of July, A. D. 1907.

(Notarial Seal) REN D. MARR, Notary Public.

My Commission expires Jan. 12-1911.

252 Exhibit "F" to Defendants' Proof.

Mounds, Indian Territory,
March 25th, 1907.

Hon. Dana H. Kelsey, U. S. Indian Agent,
Muskogee, Indian Territory.

Dear sir:—As a further reason for protest on my part against approval of Oil and Gas Mining Lease executed by me on or about March 23rd, 1906, purporting to be executed in favor of one Mr. Shulthis, I desire to say that one Eugene McElwaine took said lease from me and paid me $100 bonus therefor, representing to me that he was taking said lease for himself, and I never knew until recently that Mr. Shulthis had anything to do with said lease. Said lease above referred to being on the following land (being a part of the allotment of my minor son, Andrew J. Berryhill, deceased);

The NE/4 of the NW/4 of Section -18-; and the SW/4 of NW/4 of Section -6-; all in Township Seventeen (17) North, Range Twelve (12) East, and being within the Creek Nation, Western District of the Indian Territory.

Eugene McElwaine told me that he was taking the lease for himself and so read the lease to me (I cannot read english for myself); he further said that he would drill on said land within one year from the date of execution of said lease. He read the lease to me and from the way he read it it did not say anything about the Secretary of the Interior having to approve the lease before the said McElwaine would drill for oil or gas.

I have sold all of said land now and do not want said lease approved. It was fraudulently taken from me as aforesaid, still I am perfectly willing to pay Mr. Eugene McElwaine back his $100, as I do not want something for nothing.

For further grounds of protest will say that Mr. McElwaine did not comply with the rules and regulations of the Interior Department in force March 23rd, 1906, in that he used
253 the wrong blank lease blanks. He afterwards tried to get me to execute the lease on the correct blanks which I refused to do.

I never heard of any Mr. Shulthis and never heard his name mentioned in my life until I filed the first protest in this case, at which time I was advised that the records of the Indian Agent's office showed that the lessee in said lease was one Mr. Shulthis (forget what said lease shows his first name to be.)

Very truly yours,
his
(Signed) GEORGE D. X BERRYHILL.
mark

Witness to Mark:—
Monta A. Shipman,
William F. Dermott.

Endorsements: No. 17349, Received Mar. 26, 1907. Office of U. S. Indian Agent, Muskogee, Ind. Ter. March 25, Geo. F. Berryhill, Sapulpa, I. T.

8838 Protests against approval of oil and gas lease to A. W. Shulthis.

3-24-06
4-21-06 Lease. WDF
2-25-07 Bd filed
Protest heard
No ans File with Lease.

This is to certify that I am the officer having custody of the records of the Union Agency pertaining to oil and gas mining leases on lands to members of the Five Civilized Tribes, and that the above and foregoing is a true and correct copy of a letter filed on March 26, 1907, for consideration with oil and gas mining lease No. 8838.

DANA H. KELSEY,
United States Indian Agent.

Feb. 3, 1908.
C. E. G.

254 Plaintiff's Exhibit "X" to Plaintiff's Proof.

Department of the Interior.

United States Indian Service.
Union Agency.

In the matter of the protest of George F. Berryhill and Clemtine Berryhill, sole heirs of Andrew J. Berryhill, against the approval of an oil and gas mining lease executed to Albert W. Shulthis.

Lease No. 8838.

Before W. D. Ford, representing the United States Indian Agent at Tulsa, Indian Territory, March 20, 1907.

George F. Berryhill appeared in behalf of himself and his wife and stated that he desired to prosecute his protest on the grounds that the lessee had not completed his lease is required by the Department in regards to securing the approval of the same and that sufficient time has elapsed.

C. L. Thomas appeared in behalf of the lessee.

John Chaney, being duly sworn testified as follows:

Examination

By Mr. Thomas:

Q. Where do you live? A. Sapulpa, I. T.
Q. How old are you? A. Fifty.
Q. What business are you engaged in?

A. I am in the oil and gas business.

Q. For yourself? A. For myself and other parties to.

Q. Were you present when the lease from George F. Berryhill and Clementine Berryhill, heirs of Andrew J. Berryhill was executed? A. Yes sir.

Q. To Albert W. Shulthis? A. Yes sir.

Q. Do you know whether the lease was read over to the lessor? A. Yes sir.

Q. Who read it over? A. Judge Betterworth.

Q. Did they understand it? A. Said they did.

Q. Was there any bonus paid for the lease? A. Yes sir.

Q. How much? A. $100.00.

Q. Do you know whether or not that was a fair amount of bonus? A. At that time that was a big bonus.

Q. Do you know what bonus was paid for land at that time adjoining that? A. I got 100 acres for $50.00.

Q. What effort, if any, since the taking of this lease have you made to complete it?

A. I had the affidavits from the estate and went to
255 Mr. Berryhill for him to sign them several times, I don't know how many times, he [agreeds] always that he would sign them but never got to it, and we had the affidavit, proof of heirship required by the Department for him to sign once and he would not sign it.

Q. When was the first time that you went to Mr. Berryhill with a Departmental form of proof of heirship, how long ago?

A. It was later, something like the middle of October.

Q. When the last time?

A. 20th of February, he absolutely refused to sign any more papers, one day I saw Mr. Berryhill and asked him to sign it, he said no he would not sign any more papers for anybody said that he had quit signing papers, but after that he told me he would sign it.

Q. Ever offer any reason for not signing?

A. No sir always [seem] to be willing to sign.

Q. Now about Clemtine Berryhill, was she willing to sign?

A. Seemed to be willing, I was to [met] them one morning at 9:00 o'clock, she said George would be up that he was tending to the hogs.

Q. How many times have you tried to get this proof of heirship? A. I could not tell.

Q. Approximately?

A. Expect something like a dozen times, I talked with him in town at several places and went to his house, I don't know how many times, he never has expressed himself as being dissatisfied with the lease. About the time we took the lease the

rulings were changed by the Secretary and I went to him to get some more papers.

By Perry McCay:

Q. For what reason did you want him to sign these papers?

A. We wanted to get it approved and go to work.

Q. For what reason did you go back to him for him to sign it again?

A. These papers were after the new form come out.

Q. You seen at the time you went back to get these new papers, by the record that he had deeded away this land?

A. No sir never noticed anything about a deed.

Q. Didn't you see it on the record about the deed at the time you went back to get the new papers?

A. Seen nothing on the record there was nothing on the record when we took the lease.

Q. Speaking about the time you went to get the new papers?

A. Didn't want to get any new papers, just went for this one paper as required by the Department.

Q. Didn't want any new papers, just wanted to complete the lease?

A. The lease was with the Indian Agent at the time you bought this land.

By Mr. Berryhill:

Q. You said when you took the lease that it had to be filed within thirty days, did you file it in thirty days after you took the lease?

By Mr. Thomas: We object to that for the lease speaks for itself, dated March 24, 1906, and filed April 21, 1906.

C. B. McElwaine, after having been duly sworn testified in behalf of the lessee as follows:

Examination

By Mr. Thomas:

256 Q. How old are you? A. 47.

Q. Where do you live? A. Independence, Kansas.

Q. Were you or were you not present when this lease from George F. Berryhill and Clementine Berryhill was executed?

A. I was present.

Q. Do you know whether or not the lease was read over to them? A. I do.

Q. Was it? A. Yes sir.

Q. Who read it over to them? A. Roy Jackson.

Q. They were present?

A. By the way in regard to my statement I wish to say that Mrs. Berryhill was not present in Mr. Jackson's office at the time the leases were drawn up, they were read over to Frank.

Q. You mean by Frank, "George"? A. Yes sir.
Q. Don't know the amount of bonus paid for the lease?
A. I do.
Q. How much was it? A. $100.00.
Q. Who paid it? A. I did.
Q. In money or by check? A. By check.
Q. Have you got the check with you? A. No not with me.
Q. Where is it? A. Independence, Kansas.
Q. Could you find it? A. Yes sir.
Q. Did either of the Berryhills express being dissatisfied with the trade to you? A. No sir.

George F. Berryhill, after having been duly sworn testified as follows:

Examination

By Mr. Thomas:

Q. Mr. Berryhill when you sold this land to the McKays, did you sell it subject to this lease to Albert W. Shulthis, did you tell them this lease was on there? A. Yes sir.
Q. That was before the deed was made, you told Mr. Chaney that this land was sold subject to the lease?
A. I don't remember.
Q. Did you tell them that you had already given a lease to Mr. Shulthis? A. Yes sir.

By Mr. Ford:

Q. Who did you tell that to, when you sold the land who did you tell you had given a lease?
A. I told them had given a lease on it.
Q. Which one did you tell that to? A. Both of them.

By Mr. Thomas:

Q. How old are you?
A. I believe I am twenty-seven years old.
Q. Where do you reside?
A. Sapulpa, one and one-half miles southeast.
Q. What relation, if any, were you to Andrew J. Berryhill? A. Father.
Q. Who was his mother? A. Clementine.
Q. Clementine? A. Yes sir.
Q. Your wife? A. Yes sir.
Q. When did Andrew J. Berryhill die? A. Died in 1901.
Q. About what month? A. October.
Q. October or November? A. Yes sir.
Q. How old was he? A. Six months.
Q. While living did he have any children?
A. I would not think he did.
Q. You know whether he had or not?
A. I would not think so.

257 Q. Answer my question, whether he did or not?
A. No sir.
Q. Have any brother and sisters? A. No sir.
Q. Have you any brothers and sisters? A. I have.
Q. What is their names?
A. Standfor, William, Theodore, Columbus, Moly, Joshiby and Mary Lee.
Q. Do you know whether your wife has [ny] brothers and sisters living at the time Andrew J. Berryhill died?
A. Yes sir.
Q. Do you know if any of her brothers and sisters have died since that time? A. No sir.
Q. Or before? A. No sir.
Q. Do you know how many brothers and sisters your wife had?
A. Let me see whether do or not, I could study and count them up.
Q. At whose suggestion did you file this protest? Who had you file it? A. I filed it myself.

Mr. McKay offers in evidence the abstract.

By Mr. Thomas: We object to the filing of the [bastract.]

By Mr. McKay:
Mr. Berryhill told us he had given some kind of a lease and that they had come back to get new papers just a few days before we bought this land, and that he didn't sign these papers.

By Mr. Thomas:
Q. You know he had given some kind of a lease?
A. He told us—
Q. A Departmental lease he told you?
A. He didn't say what kind of a lease, probably didn't know. He told us that they had come back to get some new papers signed up and that he supposed that the lease was no good.

258 And thereafter, to-wit, on the 21st day of February, 1908, a stipulation was filed herein, which stipulation is in words and figures as follows:

In the United States Circuit Court for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil and Gas Company, et al., Defendants.

Stipulation.

Come now the complainant Albert W. Shulthis by his solicitors of record C. L. Thomas and Edgar A. De Meules, and the Defendants by their solicitors of record George S. Ramsey and Preston C. West, and agree and stipulate that G. F. Mahan be appointed receiver to take possession of the lands in controversy in this suit and to do such other things as this court may order.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for complainant.

GEO. S. RAMSEY,
PRESTON C. WEST.
Solicitors for defendant.

Stipulation Indorsed: Equity No. 1. Albert W. Shulthis, Plaintiff, vs. Kiefer Oil and Gas Company, et al., Defendant. Stipulation. Filed Feb. 21, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. Thomas & De Meules, Suite 7 Masonic Bldg. Muskogee Ind. Ter. For.

And thereafter, to-wit, on the 21st day of February, 1908, the same being a regular day of the regular January 1908 term of said Court, an order was entered herein which is in words and figures as follows:

259 In the United States Circuit Court for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil and Gas Company, et al., Defendants.

Order.

Now on this the 21 day of February A. D. 1908, comes the complainant Albert W. Shulthis by his solicitors C. L. Thomas and Edgar A. de Mueles, and also come the defendant Kiefer Oil and Gas Company, D. A. Mac Dougal, Edmond McKay and Perry McJay, by their solicitors of record George S. Ramsey and Preston C. West; and thereupon comes on for hearing the stipulation filed herein wherein it is agreed by all of the parties hereto that G. F. Mahan be appointed receiver of the lands in controversy, and the court being fully advised in the premises, it is now hereby

Ordered and adjudged, that G. F. Mahan be, and he hereby is, appointed, receiver of the following described lands and premises lying and being in Creek County and within the Eastern District of the State of Oklahoma, to-wit:

The Northeast Quarter of the Northwest Quarter of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East; together with all improvements thereon of every kind, whatsoever; with authority to enter thereon and take possession of all and singular the same and every part thereof and continue in possession of the same until the further order of the court herein and to sell and dispose of all the
260 oil heretofore produced from said premises, and now in tanks on said premises; and sell and dispose of all oil which may be hereafter produced from said premises until the further order of the court. Said receiver is further authorized and empowered to proceed to sink, drill and bore wells on said lands at such points or places as may now or shall hereafter become necessary to offset or protect said premises against any wells that are now, or may hereafter be drilled upon the land adjoining said premises; and said receiver shall pay for said wells and for the completion of the same and of all tanks, lines, material and appliances and labor necessary for the operation of the same, out of the moneys coming into his hands from the sale of oil as provided for herein. And said receiver shall further manage, control and operate said premises for oil and gas, in such manner as the proper care, preservation, and protection of the same may in his judgment demand, subject to the order of this court; and he is authorized and empowered to do all things necessary or convenient to the due discharge and protection of the rights and interests of the parties hereto.

It is further ordered that said receiver, within fifteen days, file with the clerk of this court, a good and sufficient bond with surety or sureties to be approved by the judge of this court, in the penal sum of Twenty-five Thousand ($25,000.00) Dollars, conditioned for the faithful performance and discharge of his duties, and to account for all funds coming into his hands according to the order of this court.

Done on this the 21 day of February, A. D. 1908.

R. E. CAMPBELL, Judge.

Order indorsed: Equity No. 1. Albert W. Shulthis, Plaintiff vs. Kiefer Oil and Gas Company, et al., Defendant. Order filed Feb. 21, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Thomas &DeMeules, Suite 7, Masonic Bldg., Muskogee, Ind. Ter. For

261 And thereafter to-wit, on February 29, 1908, the same being a day of the regular January 1908 term of said court, the motion of George Franklin Berryhill for leave to intervene was filed herein, which motion is in words and figures as follows:

262 In the United States Circuit Court for the Eastern District of the State of Oklahoma.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil and Gas Company, Edmond McKay, Perry McKay, and D. A. MacDougal, Defendants.
George Franklin Berryhill, Intervenor.

Motion of George Franklin Berryhill for leave to intervene.

Comes now George Franklin Berryhill and moves the court for leave to file his petition in the intervention in the above entitled cause of action, a copy of which said petition is hereto attached, marked Exhibit "100", and made a part of this motion.

The foregoing motion will be based upon all the records, papers, pleadings and files in the above entitled action, and upon the said proposed petition in intervention, which is hereto attached.

O'HARE & McCAIN,
Solicitors for intervenor George Franklin Berryhill.

Attached to said motion is a copy of the bill of intervention of George Franklin Berryhill, and is marked Exhibit "100."

Motion indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. Kiefer Oil and Gas Company, et al., Defendants. George Franklin Berryhill, Intervenor. Motion of George Franklin Berryhill for leave to intervene. Filed Feb. 29, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. O'Hare and McCain, Solicitors for George Franklin Berryhill.

263 And afterwards, on February, 29, 1908, the same being a day of the regular January, 1908, term of said Court, the following order was made and entered of record in said cause, to-wit:

Albert W. Shulthis,
No. 1. vs. Equity.
D. A. McDougal, et al.

Now comes George Franklin Berryhill by O'Hare and McCain, his attorneys, and files and presents to the Court his motion to intervene herein, and the Court having considered the same and there being no objection on the part of either plaintiff or defendants, said motion is by the Court sustained and it is

Ordered that the said George Franklin Berryhill have five (5) days from this date in which to file his bill and

It is further ordered that the plaintiff and defendants herein

have ten days from this date in which to plead to said Bill of Intervention.

And afterwards, to-wit, on February 29, 1908, the same being a day of the regular January, 1908, term of said Court, a stipulation was filed herein, in words and figures as follows:

264 In the United States Circuit Court for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. Mc Dougal, Edmond Mc Kay, Perry Mc Kay, and Kiefer Oil and Gas Company, Defendants.

Stipulation.

Come now the parties hereto, by their respective solicitors of record; and stipulate and agree that:

Whereas, the city of Tulsa is the place of holding terms of the United States Circuit Court for the Eastern District of Oklahoma, nearest to the residence of the defendants in this cause;

This cause may be transferred to be heard by the United States Circuit Court for the Eastern District of Oklahoma, sitting at Tulsa.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant.

P. C. WEST,
GEO. S. RAMSEY,
Solicitors for Defendants.

O'HARE & McCAIN,
Solicitors for Intervenor.

265 Stipulation Indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, Edmond McKay, Perry McKay and Kiefer Oil and Gas Company, Defendants. Filed Feb. 20, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. Stipulation. Thomas & DeMeules, Suite 7, Masonic Bldg., Muskogee, Ind. Ter. For

And thereafter, to-wit, on the 29th day of February, 1908, the same being a day of the regular January 1908 term of said Court, an order was entered herein, which is in words and figures as follows:

266 In the United States Circuit Court for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. Mc Dougal, Edmond Mc Kay, Perry Mc Kay, and Kiefer Oil and Gas Company, Defendants.

Order.

On this 29 day of February, 1908, this cause coming on to be heard upon the stipulation of the parties filed herein, on the 29th day of February, 1908; and the complainant appearing by his solicitors of record, C. L. Thomas and Edgar A. De Meules, and the defendants appearing by their solicitors of record, George S. Ramsey and Preston C. West, and the court having been fully advised in the premises, it is now hereby

Ordered and Adjudged, that this cause be, and it is hereby continued to the April, 1908, Term of the United States Circuit Court for the Eastern District of Oklahoma, sitting at Tulsa.

Done this 29 day of February, 1908.

RALPH E. CAMPBELL, Judge.

267 Order Indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, Edmond McKay, Perry McKay, and Kiefer Oil and Gas Company, Defendants. Filed Feb. 29, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern Dist. Okla. Order. Thomas & De Meules, Suite 7, Masonic Bldg., Muskogee, Ind. Ter. For

And thereafter, to-wit, on March 4th, 1908, the Bill of Intervention of George Franklin Berryhill was filed herein, which is in words and figures as follows:

268 In the United States Circuit Court [Court] in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil and Gas Company, D. A. MacDougal, Perry McKay, and Edmond McKay, Defendants.

George Franklin Berryhill, Intervenor.

Bill of Intervention of George Franklin Berryhill.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of the State of Oklahoma.

Comes now George Franklin Berryhill, and files his bill of intervention, leave being thereto being first had, and thereupon the petition shows:

That in the month of May A. D. 1901, there was born to the intervenor herein, George Franklin Berryhill and to Clementine Berryhill, his wife, a son, who was named Andrew J. Berryhill. That the said intervenor George Franklin Berryhill, is now, and at all times herein mentioned was, a Creek Indian and a citizen of the Creek Nation, and that his name appears on the approved roll of the Creek Nation as a citizen by blood of said nation of less than full blood. That the said Clementine Berryhill is not, and at no time has been, a citizen of the Creek Nation. That the said Andrew J. Berryhill departed this life in the month of November A. D. 1901, intestate and unmarried, leaving surviving him, his father, George Franklin Berryhill,
the intervenor, his mother, the said Clementine Berry-
269 hill, and the following uncles and aunts: Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton. That he left no issue, nor brother nor sister surviving him. That thereafter, on or about the 8th day of October A. D. 1902, the name of the said Andrew J. Berryhill was duly placed on the approved Creek Indian Roll of the said Creek Nation; that thereafter there was allotted to the heirs of the said Andrew J. Berryhill, deceased, the following described lands, situated in the Creek Nation, and lying and being situate in the Eastern District of the State of Oklahoma, to-wit:

The Northeast Quarter of the Northwest Quarter of section Eighteen (18), and the East Half of the Northwest Quarter of the Northeast Quarter & SW¼ of NW¼ of NE¼ of Section Thirteen (13), Township Seventeen (17) North, Range Twelve (12) East, and Lot One (1) of section Two (2), Township Sixteen (16) North, Range Fifteen (15) East, containing 120.15 acres more or less.

That thereafter, and on the 10th day of October A. D. 1905, the United States of America, together with the Creek Nation, did execute a deed or patent to said lands, wherein and whereby the United States of America and the said Creek Nation did sell and convey unto the heirs of Andrew J. Berryhill, a Creek Indian, the above described lands. That thereafter and on the 31st day of October A. D. 1905, the said deed or patent was duly approved by the Secretary of the Interior of the United States, and is recorded in volume Two, at page 504, of the records in the office of the Commissioner to the Five Civilized Tribes. A certified copy of said patents is attached to the agreed statement of fact filed in the above entitled cause of ac-

tion, marked Exhibits "E" and "F", and are hereby made a part of this bill of intervention.

That on or about the 24th day of March A. D. 1906, the said George Franklin Berryhill and Clementine Berryhill, were the owners in fee of that part of the above mentioned land described as follows to-wit:

The Northeast Quarter of the Northwest Quarter of section Eighteen, Township Seventeen North, Range Twelve East, east of the Indian Base and Meridian in Oklahoma.

270 That on or about the 24th day of March A. D. 1906, the intervenor herein, George Franklin Berryhill, joined by his wife Clementine Berryhill, denominated as lessors, for and in consideration of the sum of One Hundred Dollars and certain covenants and stipulations, did make, execute and deliver unto Albert W. Shulthis, the complainant in the above entitled cause of action denominated as the party of the second part, their certain indenture of lease in quadruplicate, wherein and whereby they did demise, grant and let unto the said complainant Albert W. Shulthis, his executors, administrators and assigns for the term of fifteen years from the date thereof, all of the oil deposits and natural gas in or under the lands last above described, together with other lands not herein considered, with the right to prospect for, extract, pipe, store, refine and remove such oil and gas, and to occupy and use so much of the surface of said land as might be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including further, the right to use such oil and natural gas so far as it is necessary to the prosecution of said operations. That a copy of said lease is attached to the bill of complaint filed in the above entitled cause of action, marked Exhibit "I", and is hereby made a part of this bill of intervention.

That the said oil and gas mining lease contains the following covenant:

"In consideration of which the party of the second part, hereby agrees and binds himself, his successors and assigns, to pay or cause to be paid to the lessors as royalty the sum of ten per cent of the value, on the leased premises, of all crude oil extracted from the said land—"

That on the 21st day of April A. D. 1906, said lease was duly filed in the office of the United States Indian Agent, at

Union Agency, Muskogee, then Indian Territory, now Oklahoma; and on the 19th day of April A. D. 1907, was duly approved by the said Secretary of the Interior.

271 That the said complainant Albert W. Shulthis filed in the office of the said United States Indian Agent, a bond to accompany said lease, in all respects in accordance with the regulations of the said Secretary of the Interior. That on or about the 18th day of April A. D. 1907, said bond was duly approved by the Secretary of the Interior.

That said lease was in all respects executed and delivered in accordance with the rules and regulations of the Secretary of the Interior.

That thereafter, the triplicate part of said lease was duly delivered to the intervenor herein, George Franklin Berryhill, by the said Secretary of the Interior, and was on the 18th day of May A. D. 1907 filed for record in the office of the clerk of the United States Court and ex-officio recorder for the then existing Western Judicial District of the Indian Territory, at Sapulpa, in the records of said office.

That on the 13th day of May A. D. 1907, the complainant in accordance with the said regulations of the said Secretary of the Interior, did pay into the hands of the said United States Indian Agent the advances royalty provided for in said lease.

That the said complainant Albert F. Shulthis has in all things duly complied with all regulations duly and legally prescribed by the Secretary of the Interior relating to the leasing of lands of citizens of the Creek Nation for oil and gas mining purposes.

Your intervenor further alleges, that on the 5th day of June A. D. 1906, he, the said George Franklin Berryhill and Clementine Berryhill, as sole heirs of said Andrew J. Berryhill, did, for and in consideration of the sum of Two Thousand ($2000.00) Dollars, then and there paid, did make, execute and deliver to the defendants in the above entitled cause of action, Perry McKay and Edmond McKay, a warranty deed, wherein and whereby the said intervenor George Franklin Berryhill and Clementine Berryhill did purport to grant, bargain, sell and convey unto the said Edmond McKay and Perry McKay, the lands above described last. That said indenture of deed was duly and regularly filed for record in the office of the clerk of the United States Court and ex-officio recorder for the West-
272 ern District of the Indian Territory, at Sapulpa, and was recorded in the records of said office.

That on the 12th day of October, A. D. 1906, the said Edmond McKay and Perry McKay, did make, execute and deliver unto

one Arthur B. Reese of Independence, Kansas, an oil and gas mining lease upon the lands above described last, wherein and whereby the said Edmond McKay and Perry McKay did purport to grant, demise, lease and let unto the said Arthur B. Reese, the above described lands for the term of fifteen years, for the purpose of mining and operating for oil and gas; that a copy of said lease is attached to the joint and several answer of the defendants herein marked "Exhibit B" and made a part of this bill of intervention.

That on or about the 17th day of October A. D. 1906, the said Arthur B. Reese did make, execute and deliver to Josiah G. Davis an assignment of an undivided one-eighth interest in and to said lease; that on or about the said 17th day of October, A. D. 1906, the said Arthur B. Reese did make, execute and deliver to George B. Harmon an assignment of an undivided three-eighths interest in and to said lease; that on or about the 19th day of October A. D. 1906 the said Arthur B. Reese did make, execute and deliver to Albert A. Little an assignment of an undivided one-eighth interest in and to said lease; that on or about the 30th day of November A. D. 1906, the said Arthur B. Reese did make, execute and deliver to J. A. Hull an assignment of an undivided one-fourth interest in and to said lease; that on or about the 24th day of April A. D. 1907 the said Arthur B. Reese did make, execute and deliver to Bates B. Burnett an assignment of an undivided one-eighth interest and J. A. Hull an assignment of an undivided one-fourth interest in and to said lease.

That on the 30th day of April A. D. 1907, the said George B. Harmon did make, execute and deliver to George W. Barnes, Jr., an assignment of an undivided three-sixteenths interest in and to said lease. That on the said 30th day of April A. D.
273 1907 the said George W. Barnes Jr., did make, execute and deliver to George W. Barnes Sr., an assignment of an undivided three-sixteenths of said lease. That on the 18th day of July A. D. 1907 the said George W. Barnes Sr., did make, execute and deliver to the defendant in the above entitled cause of action, Kiefer Oil and Gas Company, an assignment of an undivided three-sixteenths interest in and to said lease; that on the 26th day of July A. D. 1907, the said Albert A. Little did make, execute and deliver to the aforesaid defendant Kiefer Oil and Gas Company, an assignment of an undivided one-eight interest in and to said lease; that on the 20th day of May A. D. 1907, the said George B. Harmon did make, execute and deliver to the defendant Kiefer Oil and Gas Company an assignment of an undivided three-sixteenths interest in and to said lease; that on the 27th day of April A. D. 1907 the [saod] Josiah G. Davis did make, execute and deliver to

the defendant Kiefer Oil and Gas Company an assignment of an undivided one-eight interest in and to said lease; that on the 27th day of April A. D. 1907 the said Bates B. Burnett made, executed and delivered to the defendant Kiefer Oil and Gas Company an assignment of an undivided three-eights interest in and to said lease.

That by virtue of the aforesaid assignments, the defendant herein Kiefer Oil and Gas Company, is the sole and exclusive owner and holder of all right, title, and interest in the lease made, executed and delivered on the 12th day of October A. D. 1906, by your intervenor George Franklin Berryhill and his wife, Clementine Berryhill to Arthur B. Reese.

That on or about the 20th day of August, A. D. 1907, Martha E. Lee Kiefer made, executed and delivered to the defendant herein D. A. McDougal, her certain indenture of deed wherein and whereby she did convey to the said D. A. McDougal, all her right, title and interest in and to the last above described lands, a copy of said deed being attached to the answer of the defendants and marked Exhibit "M". That said deed was duly and regularly filed for record in the office of the clerk of the United States and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

274 That on or about the 16th day of August A. D. 1907, Stanford Berryhill made, executed and delivered to the defendant herein, D. A. Mac Dougal, his certain indenture of deed wherein and whereby she did convey to the said D. A. Mac Dougal, all his right, title and interest in and to the last above described lands, a copy of said deed being attached to the answer of the defendants and marked Exhibit "M". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on the 21st day of August A. D. 1907 Columbus Berryhill did make, execute and deliver to the defendant D. A. Mac Dougal, his certain deed wherein and whereby he did convey to the said D. A. Mac Dougal, all his right, title and interest in and to the last above described lands, a copy of said deed being attached to the answer of the defendants and marked Exhibit "O". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on the 16th day of August A. D. 1907 the said Theodore Berryhill did make, execute and deliver to the defendant D. A. Mac Dougal, his certain deed wherein and whereby he did con-

vey to the defendant D. A. Mac Dougal, all his right, title and interest in and to the last above described lands, a copy of said deed being attached to the answer of the defendants and marked Exhibit "P". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on or about the 16th day of August A. D. 1907 William Berryhill did make execute and deliver to the defendant D. A. Mac Dougal his certain indenture of deed, wherein and whereby the said William Berryhill did convey to the said D. A. Mac Dougal all his right, title and interest in and to the last above described lands, a copy of said deed being attached to the answer of the defendants and marked Exhibit
275 "Q". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on the 16th day of August A. D. 1907 the said Mary Kiefer did make, execute and deliver to the defendant D. A. Mac Dougal her certain deed wherein and whereby she did convey to the defendant D. A. Mac Dougal all her right, title and interest in and to the last above described lands. That said deed is attached to the answer of the defendants and marked Exhibit "R". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on the 20th day of August A. D. 1907 the said Josie Morton did make execute and deliver to the defendant D. A. Mac Dougal her certain deed wherein and whereby she did convey to the said D. A. Mac Dougal, all her right, title and interest in and to said lands. That a copy of said deed is attached to the answer of the defendants in the above entitled cause and marked Exhibit "S". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on or about the 21st day of October A. D. 1907 the defendant D. A. Mac Dougal did make, execute and deliver to the defendant herein, Kiefer Oil and Gas Company, an oil and gas mining lease upon the above described lands, wherein and whereby the said D. A. Mac Dougal did grant, demise and let unto the said Kiefer Oil and Gas Company the above described lands for the purpose of mining and operating the same for oil and gas. That a copy of said lease is attached to the

answer of the defendants herein and marked Exhibit "T". That said deed was duly and regularly recorded in the office of the clerk of the United States Court and ex-officio recorder for the Western District of the Indian Territory at Sapulpa.

That on or about the 28th day of October A. D. 1907, the defendants Edmond Mc Kay and Perry Mc Kay did
276 make, execute and deliver to the defendant Kiefer Oil and Gas Company, a lease, wherein and whereby the said Edmond Mc Kay and Perry Mc Kay did let, lease and demise to the said Kiefer Oil and Gas Company for a term of fifteen years from and after October A. D. 1906, the above described lands, for the purpose of erecting tanks thereon.

That the defendant Kiefer Oil and Gas Company has bored and drilled oil and gas wells on said lands; that there are six producing wells on said lands producing large amounts of oil each day; the exact amount of which is to your intervenor unknown; that it will be necessary for the proper development and protection of said lands that more wells be drilled by the receiver.

That the defendants and each of them claim an interest in said lands adverse to your intervenor, and that the said defendants are without any right whatever, and that the defendants have not, nor have any one of them, any right, estate, title or interest whatever in said lands or any part thereof.

That the aforesaid deed by your intervenor George Franklin Berryhill and Clementine Berryhill, made, executed and delivered to the defendants Edmond Mc Kay and Perry Mc Kay, and the record thereof, is a cloud upon the title of your intervenor to the above described lands and depreciates the value thereof; that your intervenor is without adequate remedy at law.

That the lease made and executed and delivered by Edmond Mc Kay and Perry Mc Kay to Arthur B. Reese, on or about the 12th day of October A. D. 1906, and the record thereof, is a cloud upon the title of your intervenor in and to the said lands; that the various assignments by the said Arthur B. Reese, Josiah G. Davis, George B. Harmon, A. A. Little, George W. Barnes, Jr., J. A. Hull, Bates B. Burnett and George W. Barnes, Sr., as aforesaid, wherein and whereby all the right, title and interest obtained by Arthur B. Reese in and to the lands above described, and their record are clouds upon the title of your intervenor.

That the deeds to the above described lands made exe-
277 cuted and delivered to the defendant D. A. Mac Dougal, by Martha Lee Kiefer on August 20 1907, by Stanford

Berryhill on August 16 1907, by Columbus Berryhill on August 21 1907, by Theodore Berryhill on August 16 1907, by William Berryhill on August 16 1907, By Mary Kiefer on August 16 1907, by Josie Morton on August 20 1907, and the records thereof, are clouds upon the title of your intervenor in and to said lands.

That the lease on the above described lands, made, executed and delivered by the defendant D. A. MacDougal and his wife Myrtle A. MacDougal to the defendant Kiefer Oil and Gas Company, on the 21st day of October A. D. 1907, is a cloud upon the title of the intervenor in and to said lands.

That the lease on the above described lands made, executed and delivered to the defendant Kiefer Oil and Gas Company on the 28th day of October A. D. 1908 by the defendants Edmond McKay and Perry McKay is a cloud upon the title of your intervenor in and to said lands.

That your intervenor does hereby offer to pay, and does hereby aver that she is willing, ready and able to pay to the defendants Perry McKay and Edmond McKay the aforesaid sum of Two Thousand Dollars with interest, or whatsoever may be due to the said Perry McKay and Edmond McKay.

Wherefore, your intervenor prays:

1. That the defendants D. A. MacDougal, Edmond McKay, Perry McKay and the Kiefer Oil and Gas Company, and each and all of them, be required to set forth the nature of his or her claim, and that all adverse claims of the defendants and all of them, may be determined by a decree of this court.

2. That by said decree it shall be declared and adjudged that the defendants have no estate or interest whatsoever in said lands and premises or in any part thereof, and that the title of your intervenor thereto is good and valid in fee to the above described property, subject, however, to an oil and gas lease upon said lands made, executed and delivered by your intervenor Clementine Berryhill to the complainant in the above entitled cause of action, Albert W. Shulthis, on
278 the 24th day of March A. D. 1907, for a term of fifteen years; and that the title of your intervenor in and to said lands be quieted.

3. That upon the final decree of this court the receiver heretofore appointed to take possession of said lands and to operate them, and to sell the oil produced therefrom, be ordered to pay to your intervenor, George Franklin Berryhill, or to his heirs

or assigns, a sum equal to ten per cent of the value of all crude oil extracted by him from said land.

4. That upon the final decree of this court the defendant Kiefer Oil and Gas Company be ordered to pay to your intervenor, George Franklin Berryhill, or to his heirs or assigns, a sum equal to ten per cent of the value of all crude oil extracted by the said Kiefer Oil and Gas Company from the said lands.

5. That the said warranty deed, so made, executed and delivered as aforesaid by your intervenor George Franklin Berryhill, and his wife Clementine Berryhill, to the defendants Edmond McKay and Perry McKay, on the 5th day of June A. D. 1906, and recorded in the office of the clerk of the United States Court for the Western District of the Indian Territory and ex-officio recorder at Sapulpa, then Indian Territory, now Oklahoma, wherein and whereby the intervenor purported to convey to said defendants the land hereinbefore described, be declared null and void, and that no interest passed thereby, and that the same be ordered to be delivered up and cancelled as a cloud upon the title of your intervenor in and to said lands.

6. That the indenture of lease by the defendant Edmond McKay and Perry McKay, on the 12th day of October A. D. 1906, made, executed and delivered to Arthur B. Reese, wherein and whereby the said defendants did attempt to demise, let and lease unto the said Arthur B. Reese, the said property for oil and gas purposes, be declared null and void and that no interest passed thereby and that the same be ordered to be delivered up and cancelled as a cloud upon the title of your intervenor in and to said lands.

7. That the indenture of deed to the last above described lands by Martha E. Lee Kiefer made, executed and de-
279 livered to the defendant D. A. MacDougal, on the 20th day of August A. D. 1907, by Stanford Berryhill on the 16th day of August A. D. 1907, by Columbus Berryhill on the 21st day of August A. D. 1907, by Theodore Berryhill on the 16th day of August A. D. 1907, by William Berryhill on the 16th day of August A. D. 1907, by Mary Kiefer on the 16th day of August A. D. 1907, by Josie Morton on the 20th day of August A. D. 1907, wherein and whereby they did attempt to convey an interest in and to the above described lands, be declared null and void and that no interest passed thereby, and that the same be ordered to be delivered up and cancelled as a cloud upon the title of your intervenor in and to the said lands.

8. That the oil and gas mining lease on the 21st day of October A. D. 1907 by the defendant D. A. MacDougal, made, executed and delivered to the defendant Kiefer Oil and Gas Company, upon the above described lands, be declared null and void and that no interest passed thereby and that the same be ordered to be delivered up and cancelled as a cloud upon the title of the intervenor in and to said lands.

9. That the lease by the defendants Edmond McKay and Perry McKay on the 28th day of October A. D. 1907, made, executed and delivered to the defendant Kiefer Oil and Gas Company on the above described lands, be declared null and void and that no title passed thereby, and that the same be ordered to be delivered up and cancelled as a cloud upon the title of the intervenor in and to said lands.

10. That upon a hearing upon your intervenors bill, a decree be entered decreeing to the intervenor such relief as upon this bill and the answers thereto may be meet and just and equitable.

11. That the complainant Albert W. Shulthis and the defendants D. A. MacDougal, Perry McKay, Edmond McKay and the Kiefer Oil and Gas Company may be cited to appear herein and answer this intervenors bill, tho not under oath, oath or affirmation thereto, being hereby expressly waived.

O'HARE & McCAIN,
Solicitors for Intervenor.

280 County of Wagoner,
State of Oklahoma—ss.

George Franklin Berryhill, being first duly sworn, upon oath deposes and says: That he is the intervenor in the above entitled cause of action; that he has heard read the foregoing bill of intervention and that the statements therein contained are true.

his
GEORGE FRANKLIN X BERRYHILL.
mark

Witness to mark, C. E. Killmer.

Subscribed and sworn to before me on this 2nd day of March, A. D. 1907.

(Seal) C. E. KILLMER,
Notary Public.

My Commission expires June 13, 1908.

Bill of Intervention indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. Keifer Oil and Gas Company, et al., Defendants. George Franklin Berryhill, Intervenor. Bill of

Intervention. Filed Mar. 4, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern District Oklahoma. O'Hare and McCain, Solicitors for Intervenor.

And thereafter, to-wit, on March 16, 1908, the answer of defendants Edmond McKay and Perry McKay to the bill of intervention of George Franklin Berryhill, was filed herein and is in words and figures as follows:

281 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil & Gas Co., D. A. MacDougal, Edmond McKay and Perry McKay, Defendants, and
George Franklin Berryhill, Intervener.

Answer of Defendants, Edmond McKay and Perry McKay, to the Bill of Intervention Filed by George Franklin Berryhill.

Come now the defendants, Edmond McKay and Perry McKay, by and through their counsel, N. A. Gibson and George S. Ramsey, and reserving to themselves all exceptions to the manifest errors and defects in said bill of intervention, and not waiving any of such defects and errors, for answer say that:

They deny that the Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East of the Indian Base and Meridian, being the land in controversy, was sold by the Creek Nation to the heirs of Andrew J. Berryhill, deceased.

They aver and plead that the said land, among other
282 lands, was set apart by the Commission to the Five Civilized Tribes to Andrew J. Berryhill, deceased, and patent therefor issued as alleged in the pleadings in this case, and shown by the facts to the heirs of Andrew J. Berryhill, deceased.

Defendants admit that on June 5, 1906, George Franklin Berryhill, the intervener, with his wife, Clementine Berryhill, joining therein, and claiming to be the sole heirs of Andrew J. Berryhill, deceased, did, for and in consideration of the sum of Two Thousand Dollars, then and there paid, make, execute and deliver to the defendants, Edmond McKay and Perry McKay, a warranty deed, wherein and whereby the said intervener, George Franklin Berryhill and Clementine Berryhill, did grant, bargain, sell and convey unto the said defendants, Edmond McKay and Perry McKay the land above described—that is, the land in controversy in this case, said deed being on file in the record as Exhibit to the evidence taken by the Examiner, Giles A. Penick.

They admit that the said deed was filed for record and recorded as alleged in the pleadings heretofore filed.

Defendants deny that said deed executed by George Franklin Berryhill and his wife, Clementine Berryhill, to said defendants, on June 5, 1906, was or is a cloud on the title of the intervener, Geo. Franklin Berryhill.

Defendants aver and plead that whatever right, title and estate George Franklin Berryhill did have or acquire in the said land by virtue of being the father of Andrew J. Berryhill, deceased, was duly and legally conveyed to them on June 5, 1906, for a valuable consideration—the sum of Two Thousand Dollars.

Defendants aver and plead that George Franklin Berryhill was an adult citizen by blood of the Creek Nation, and not a full-blood, as shown by the rolls made up by the Commission.

283 Defendants aver and plead that George Franklin Berryhill, under the provisions of Section 22 of the Act of Congress approved April 26, 1906, and entitled, "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes," removed the restrictions upon the alienation of this land in controversy from the heirs of Andrew J. Berryhill, deceased, and empowered and authorized George Franklin Berryhill, the intervener, to convey and alienate whatever interest and title he acquired in said land under the law and they aver and plead that they claim whatever title George Franklin Berryhill had in said land by virtue of the deed executed on June 5, 1906, and they rely upon said section 22 of the said Act of Congress as entitling them to sustain their title to the said land.

Defendants deny that the plaintiff, Albert W. Shulthis, is entitled to said land for mineral purposes under the departmental lease mentioned in the bill of intervention, and in the other pleadings in this case; they deny that said lease is valid and enforcible, and they deny that the intervener, George Franklin Berryhill, is entitled to any royalty under said lease, or under any other lease, and they deny that George Franklin Berryhill has any right, title or estate of any kind or character in and to the said land.

Defendants deny each and every allegation in said bill of intervention not heretofore specifically denied or admitted, and deny the same as fully and completely as if specifically denied.

Having fully answered, defendants pray that the said bill of intervention be dismissed and that they be allowed to go hence with all costs.

N. A. GIBSON,
GEO. S. RAMSEY.

264 State of Oklahoma,
County of Muskogee—ss.

Personally appeared before me, Ed. Hirsh, Notary Public in and for the above said State and County, Edmond McKay and Perry McKay with whom I am personally acquainted, and who made oath that they are defendants in the above styled cause; that they have read over the above answer to the bill of intervention filed by George Franklin Berryhill, and that the statements therein contained are true, as they verily believe.

EDMOND McKAY.
PERRY McKAY.

Sworn to and subscribed to in my presence on this March 12, 1908.

(Seal) ED. HIRSH,
Notary Public.

My Commission Expires Jany. 4th, 1912.

Answer Indorsed: No. 1 Eq. Albert W. Shulthis, Complainant, vs. Edmond McKay, Perry McKay, et al. Defts. and George Franklin Berryhill, Intervenor. Answer of Edmond & Perry McKay, to the Bill of Intervention. Filed Mar. 16, 1908. L. G. Disney, Clerk U. S. Circuit Court, Eastern District Oklahoma. Gibson & Ramsey, Muskogee, Okla. Attorneys for Defendant.

And thereafter, to-wit, on March 16, 1908, the answer of defendants Kiefer Oil and Gas Co. and D. A. McDougal, to the bill of intervention of George Franklin Berryhill, was filed herein, and is in words and figures as follows:

285 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil & Gas Co., D. A. MacDougal, Edmond McKay and Perry McKay, Defendants,
and
George Franklin Berryhill, Intervenor.

Answer of Defendants, Kiefer Oil & Gas Co., and D. A. MacDougal, to the Bill of Intervention Filed by George Franklin Berryhill in this case.

Come now the said defendants, by and through their counsel, Preston C. West, William M. Mellette, N. A. Gibson and George S. Ramsey, and for answer say that:

Paragraph One.

They deny that the land in controversy in this case, and described in the complaint, and also in the intervening bill of George Franklin Berryhill, was sold to the heirs of Andrew J. Berryhill, deceased, by the Creek Nation;

They deny that on the 24th day of March, 1906, or at any
286 other time, George Franklin Berryhill, the intervenor, with or without his wife, Clementine Berryhill, was the owner in fee of the Northwest Quarter of the Northwest Quarter of Section Eighteen, Township Seventeen North, Range Twelve East, of the Indian Base and Meridian, being the land in controversy;

Defendants admit that on June 5, 1906, George Franklin Berryhill, with his wife, Clementine Berryhill, joining therein, and claiming to be the sole heirs of Andrew J. Berryhill, deceased, [die] for and in consideration of the sum of Two Thousand Dollars, then and there paid, make, execute and deliver to the defendants, Edmond and Perry McKay, a warranty deed wherein and whereby the said intervener, George Franklin Berryhill and Clementine Berryhill, did grant, bargain, sell and Convey unto the said Edmond McKay and Perry McKay, the land above described, to-wit, the land in controversy in this case;

Defendants state that said deed is now filed as Exhibit to the evidence in this case taken before the Examiner, Giles A. Penick:

They admit that said deed was filed for record and recorded as alleged;

Defendants deny that said deed executed by George Franklin Berryhill and his wife, Clementine Berryhill, to the defendants Edmond McKay and Perry McKay on June 5, 1906, was or is a cloud on the title of the intervener, George Franklin Berryhill;

Defendants deny that George Franklin Berryhill inherited the land in controversy, or any part thereof, or any estate or title of any kind or character in said land, and they deny that George Franklin Berryhill was the sole heir of Andrew J. Berryhill, deceased;

Defendants aver and plead that whatever right, title and estate George Franklin Berryhill did have or acquire in the said land by virtue of being the father of Andrew J.
287 Berryhill, deceased, was duly and legally conveyed by him to Edmond and Perry McKay, two of these defendants, on June 5, 1906.

Paragraph Two.

Defendants admit that Edmond McKay and Perry McKay did on October 12, 1906, execute and deliver to Arthur B. Reese, a mineral lease on the land in controversy, as alleged in the intervening petition, and that said lease, by mesne assignments, became the property of the defendant, Kiefer Oil and Gas Company, prior to April, 1907; Defendants deny that said lease, which is on file in the record in this case is a cloud on any right or title of the intervener to the said land;

Defendants aver and plead that the Kiefer Oil and Gas Company, acting upon the faith of said lease held by it by mesne assignments, entered upon said land and did, after August 8, 1907, with the full knowledge of the intervener, George Franklin Berryhill, drill various oil wells upon the said land, and expend large sums of money in developing said property for oil and gas purposes, to-wit, about Thirty Thousand Dollars, and placed upon the land permanent improvements in the nature of derricks, pipes, pipe lines, engines, tools and appliances to the value of several thousand dollars, and continued to operate said property and make improvements thereon through the months of October, November and December, 1907, and January, 1908, without any protest from intervener, or without any notice from the intervener that he claimed or would claim the title to this land in controversy;

Defendants aver and plead that they entered into possession of the said land and made these valuable improvements thereon under color of title, to-wit, said lease, and they aver and plead that said George Franklin Berryhill stood by and
288 saw them expend large sums of money in the development of said property without any notice to them or claim upon his part that they were trespassers and not entitled to improve said land or hold the same for mineral purposes;

Defendants therefore aver and plead that in as far as the defendant, Kiefer Oil and Gas Company, is concerned, George Franklin Berryhill, by his action, is estopped to assert any adverse claim to said land against the interest of defendant, Kiefer Oil and Gas Company.

Paragraph Three.

Defendants aver and plead that the title to said land was never in George Franklin Berryhill nor his wife, Clementine Berryhill;

That neither of them were heirs of Andrew J. Berryhill;

That neither of them ever acquired any interest or title of any kind in the said land;

Defendants aver and plead that the uncles and aunts and grandmother of Andrew J. Berryhill, from the father's side, took the entire title to said land and that the title in fee is now in defendant, D. A. McDougal, under and by virtue of deeds executed to him by the uncles and aunts of Andrew J. Berryhill, deceased, to-wit, the brothers and sisters of intervener, George Franklin Berryhill, named and specified in the answer of defendants and in the intervening petition of intervener, and, in addition thereto, defendant, D. A. MacDougal, is the owner and holder of whatever right, title and interest the grandmother, Airy Anne Berryhill, acquired in said land by virtue of the deed executed and delivered by her to said D. A. MacDougal on October 18, 1907, a copy of said deed being hereto attached as Exhibit "X" showing the acknowledgment and registration of the same;

289 Defendants aver and plead that Airy Anne Berryhill is the mother of George Franklin Berryhill, and the only surviving grand-parent, on the father's side, the grandfather of Andrew J. Berryhill, and father of George Franklin Berryhill, the intervener, having died long before the land in this case was allotted and long before the act of Congress of May 27, 1902. Defendants deny every allegation not expressly admitted.

The premises considered, defendants pray that said bill of intervention filed by George Franklin Berryhill be dismissed at his cost.

WM. M. MELLETTE,
P. C. WEST,
N. A. GIBSON,
GEO. S. RAMSEY,
Counsel for Defendants.

State of Oklahoma,
County of Creek—ss.

Personally appeared before me, J. W. McNeel, a Notary Public in and for the above said state and county, D. A. MacDougal, with whom I am personally acquainted, and who made oath that he is one of the defendants mentioned in the above answer; that he has read over the above answer, and that the statements and facts therein are true as he verily believes.

(Seal) D. A. McDOUGAL.

Sworn to and subscribed to in my presence on this 12 day of March, 1908.

J. W. McNEEL, Notary Public.

My Commission expires the 24 day of Feb., 1912.

290 State of Oklahoma,
County of Muskogee—ss.

Personally appeared before me Geo. A. Lowell, a Notary Public in and for the above said State and County, E. C. Bothwell, with whom I am personally acquainted, and who made oath that he is Secretary of the defendant Kiefer Oil and Gas Company and that he has read over the above answer and states on oath that the facts and allegations of fact therein set up are true as he verily believes.

E. C. BOTHWELL.

Subscribed and sworn to in my presence this 14th day of March, 1908.

(Seal) GEORGE A. LOWELL, Notary Public.
My Commission expires the 2 day of August, 1911.

291 Exhibit to answer of Defendants to Bill of Intervenor.

Know All Men By These Presents: That I, Airy Anne Berryhill, of Sapulpa, Western District, Indian Territory, for and in consideration of Fifty ($50) Dollars, cash in hand paid, the receipt [os] which is hereby acknowledged, have this day bargained and sold, and do hereby transfer and convey unto D. A. McDougal, and to his heirs and assigns forever, all right, title, claim and interest in and to the following described real estate situated in the Creek Nation, Western District of the Indian Territory, to-wit:

The Northeast Quarter of the Northwest Quarter of Section 18, Township 17 North, Range 12 East, and the Southwest Quarter of the Northwest Quarter of Section 6, Township 17 North, Range 12 East, and the East Half of the Northwest Quarter of the Northeast Quarter, and the Southwest Quarter of the Northwest Quarter of the Northeast Quarter of Section 13, Township 17 North, Range 12 East, being part of the allotment of Andrew J. Berryhill, deceased,

with all the improvements, privileges and appurtenances thereunto belonging or in any wise appertaining.

To have and to hold the aforegranted premises to the said D. A. McDougal, his heirs and assigns forever. And we covenant with the said D. A. McDougal that we will warrant and forever defend the title to the aforegranted premises against the lawful claims of all persons claiming under, through or by us, but not further or otherwise.

In witness whereof, I, the said Airy Anne Berryhill, have hereunto set my hand and seal, this the 18th day of October, 1907.

(Seal) (Signed) her AIRY ANNE X BERRYHILL. mark

Witness:
Mary C. Kiefer, (Signed)
Carrie Kiefer (Signed)

United States of America,
Western District,
Indian Territory.

On this 18th day of October, 1907, before me, R. C. Kin-
292 naid a Notary Public, within and for the Western District, of the Indian Territory, appeared in person Airy Anne Berryhill, to me personally well known as the person whose name appears upon the within and foregoing deed of conveyance as the party grantor, and stated that she had executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

In testimony whereof, I have hereunto set my hand as such Notary Public, at Sapulpa, Indian Territory, in said district and territory on the 18th day of October, 1907.

(Seal) (Signed) R. C. KINNAID,
Notary Public.

My Commission expires June 22, 1909.

Endorsed on Reverse side as follows: Deed, Airy Anne Berryhill to D. A. McDougal. Indian Territory, Western District, At Sapulpa, Ind. Ter., I hereby certify that this instrument was filed for record in my office on Oct. 18, 1907, at 3 o'clock p. m., and is duly recorded in Record 28, page 523. O. M. Irelan, Deputy Clerk & Ex-Officio Recorder.

Answer Indorsed: No. 1 Eq. Albert W. Shulthis, Complainant, vs. Kiefer Oil & Gas Co. et al. Defendants, & George Franklin Berryhill, Intervenor. Answer of Defts. Kiefer Oil & Gas Co. et al. to Bill of Intervention. Filed Mar. 16, 1908. L. G. Disney Clerk U. S. Circuit Court Eastern District Oklahoma Gibson & Ramsey Muskogee, Okla. Attorneys for Defendants.

And thereafter, to-wit, on March 16, 1908, the answer of the complainant, Albert W. Shulthis, to the bill of intervention of George Franklin Berryhill, was filed herein, and is in words and figures as follows:

293 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
Kiefer Oil & Gas Co., D. A. MacDougal, Edmond McKay and Perry McKay, Defendants, and
George Franklin Berryhill, Intervener.

Answer of Complainant.

To the Bill of Intervention filed by George Franklin Berryhill.

Comes now the complainant, Albert W. Shulthis, by and through his solicitors, of record, C. L. Thomas & Edgar E. DeMeules and for answer to the bill of intervention filed herein say:

That they admit that on or about the 8th day of October, 1902, the name of Andrew J. Berryhill, deceased, was duly placed on the approved Creek Indian roll of the Creek Nation, and that thereafter, there was allotted to the heirs of the said Andrew J. Berryhill, the lands in controversy in this case, as described in the intervening bill of George Franklin Berryhill.

The complainant admits that on the 10th day of October, 1904, the United States of America, together with the Creek Nation did execute a deed or patent to said lands, wherein and whereby the United States of America and the said Creek Nation, did convey unto the heirs of Andrew J. Berryhill, a deceased Creek Indian the aforesaid lands. Complain-
294 ant admits that on the 24th day of March, 1906, the said interevener, joined by his wife, Clementine Berryhill, did make, execute and deliver unto the complainant, a certain indenture of lease in quadruplicate as in said bill of intervention set forth and is shown by exhibit on one of the bill of complaint filed herein and admits that said lease was duly filed in the office of the United States Indian Agent at Muskogee Oklahoma. And that on the 19th day of April, 1907, said lease was duly approved by the Secretary of the Interior.

Complainant further admits the filing and approval of a bond to accompany said lease and the payment of the advanced royalty and the delivery of the triplicate part of said lease to the said intervener, all as in said bill of intervention set forth.

Complainant further admits that he has in all things in connection with said lease, duly complied with all regulations, duly and legally prescribed by the Secretary of the Interior, relating to the lease of the lands of citizens of the Creek Nation, for oil and gas mining purposes.

The complainants avers and pleads that he used all due diligence to have said lease approved by the said Secretary of the Interior without delay. And avers and pleads that he has, since the approval of said lease, at all times used all available means to fulfill the covenants and stipulations in said leased contained.

Complainant admits that under the terms of said lease, he is bound to pay or cause to be paid to the lessors, as royalty, the sum of ten percent of the value of the leased premises, of all crude oil extracted from the said land. But complainant avers and pleads since the approval of said lease he has been prevented from entering the said lands, covered by said lease by the wrongful acts of the defendants herein. That he has repeatedly attempted to enter on said premises to develop the same for oil and gas as required for the terms of said lease but that he has at all times been excluded therefrom by the defendants herein.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant.

295 Complainant's Answer Indorsed: Equity No. 1. Albert W. Shulthis Complainant vs. D. A. McDougal, et al. Defendants. Complainant's answer to Bill of Intervention. Filed Mar 16 1908 L. G. Disney Clerk U. S. Circuit Court Eastern District Oklahoma. Thomas & DeMeules, Suite 7, Masonic Bldg. Muskogee Ind. Ter. For Complainant.

And thereafter, to-wit, on March 16, 1908, there was filed herein a stipulation of the parties hereto, which is in words and figures as follows:

296 In the United States Circuit Court in and for the Eastern District of the State of Oklahoma, Sitting at Muskogee.

Albert W. Shulthis, Complainant
No. 1. vs. Equity.
The Kiefer Oil & Gas Co., D. A. MacDougal, Edmond McKay, Perry McKay, Defendants,
and
George Franklin Berryhill, Intervener.

Stipulation.

It is agreed by and between counsel for the complainant and the defendants upon the one hand, to-wit, Thomas & DeMeules, West & Mellette and Gibson & Ramsey, and counsel for Geo. Franklin Berryhill, the intervener, on the other hand, O'Hare & McCain, that the bill of intervention filed by Geo. Franklin

Berryhill in this case shall be set down for hearing on bill and answer—that is, the answers filed by the defendants and the answer filed by the complainant to the said bill of intervention, and shall be heard by the Court at the same time the whole case is heard and tried, and upon the trial of this cause, in as far as the bill of intervention is concerned, it is agreed that the Court may look to the entire record including all of the evidence taken before Giles A. Penick, the examiner, with the exhibits filed in this case heretofore, and it is also agreed that the Court may look to the agreed statement of facts heretofore filed in this case, signed by counsel for the complainant and counsel for the defendants, and all of the various stipulations heretofore filed it being the intention of the parties that the whole record shall be examined, in so far as applicable, in disposing of the bill of intervention on bill and answer according to equity rules.

It is agreed that this stipulation be filed in the record
297 and become a part thereof.

This March 16, 1908.

THOMAS & DeMEULES,
Counsel for Complainant.

WEST & MELLETTE,
GIBSON & RAMSEY,
Counsel for Defendants.

O'HARE & McCAIN,
Counsel for Intervener.

Stipulation Indorsed: No. 1 Eq. Albert W. Shulthis, Complainant, vs. Kiefer Oil and Gas Co. D. A. MacDougal, at al. Defendants, & Geo. Franklin Berryhill, Intervenor. Stipulation. Filed Mar 16 1908 L. G. Disney Clerk U. S. Circuit Court Eastern District Oklahoma. Gibson & Ramsey Muskogee, Okla. Attorneys for

And thereafter, to-wit, on the 30th day of May, 1908, a stipulation was filed herein, which is in words and figures as follows:

298 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Tulsa.

Albert W. Shulthis, Complainant,
Equity vs. No. 1.
D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company, Defendants.
George Franklin Berryhill, Intervenor.

Stipulation.

Come now the parties hereto, the Complainant by his solicitors C. L. Thomas and Edgar A. De Meules, the Defendants

by their solicitors George S. Ramsey and Preston C. West, and the Intervenor by his solicitors S. V. O'Hare and F. L. McKain, and stipulate and agree that this cause be transferred to McAlester for decision at the June, 1908, term of this Court, and that a decree be entered herein at the said term of said Court.

Dated this 29th day of May, 1908.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant.

PRESTON C. WEST,
GEO. S. RAMSEY,
Solicitors for Defendants.

S. V. O'HARE.
F. L. McCAIN,
Solicitors for Intervenor, George Franklin Berryhill.

299 Stipulation indorsed: Equity No. 1. Albert W. Shulthis, Plaintiff. vs. D. A. McDougal, et al. Defendant. Filed May 30 1908 L. G. Disney Clerk U. S. Circuit Court Eastern District Oklahoma. Stipulation. Thomas & DeMeules, Suite 7, Masonic Bldg. Muskogee Ind. Ter. For

And thereafter, to-wit, on the 30th day of May, 1908, the same being a day of the regular April 1908 term of said Court, an order was entered herein, which is in words and figures as follows:

300 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Tulsa.

Albert W. Shulthis, Complainant,
Equity vs. No. 1.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.
George Franklin Berryhill, Intervenor.

Order.

This cause coming on to be heard this day upon the stipulation of the parties [parties] hereto, and the Court being fully advised in the premises, it is hereby

Ordered, That the above entitled cause be and it is hereby transferred to McAlester, and is hereby continued to the June, 1908, term of said Court.

Done this 30th day of May, 1908.

RALPH E. CAMPBELL,
Judge.

Order indorsed: Equity No. 1. Albert W. Shulthis, Plaintiff. vs. D. A. McDougal, et al. Defendant. Order. Filed May 30 1908, L. G. Disney Clerk U. S. Circuit Court Eastern District Oklahoma. Thomas & DeMeules Suite 7, Masonic Bldg. Muskogee Ind. Ter. For

And thereafter, on June 2nd, 1908, the same being a day of the regular June 1908 term of said Court, said Court handed down its opinion, in said cause, which is in words and figures following, to-wit:

301 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants,
George Franklin Berryhill, Intervenor.

Opinion.

Campbell, Judge.

This is a suit in equity instituted by the complainant, Albert W. Shulthis, against the defendants, asserting his right to the oil and natural gas in and under the NE4 of the NW4 of Section 18, Township 17, Range 12 East of the Indian Base Meridian in Oklahoma, and praying that the defendants be enjoined from interfering with his use and occupancy of said land; from going upon and operating or prospecting the same for oil and gas purposes; that the cloud cast upon his title by the adverse claims of defendants be removed; that an accounting be had, and that he recover damages for being kept out of the possession of said property by said defendants.

The land in controversy is a part of that body of land formerly comprising the Creek Nation in the Indian Territory. The complainant claims under a departmental oil and gas lease, executed to him by George Franklin Berryhill, a citizen of the Creek Nation, of less than full blood, and Clementine Berryhill, his wife, a non-citizen, in March, 1906, filed in the
302 office of United States Indian Agent at Union Agency, Muskogee, Indian Territory, on April 21st, 1906, and in April, 1907, approved by the Assistant Secretary of the Interior. On June 5th, 1906, George Franklin Berryhill and Clementine Berryhill, his wife, executed to the defendants, Edmond McKay and Perry McKay, a warranty deed, conveying the land in controversy and other lands for a consideration of two thousand dollars. In October, 1906, the McKays, for a consideration of eight hundred dollars, executed an oil and gas mining lease to one Arthur B. Reese, covering the land in controversy. In the

month of August, 1907, and subsequent to the 8th day thereof, the defendant D. A. McDougal, secured deeds from the brothers and sisters of George Franklin Berryhill, upon the theory that they had inherited the fee in these lands as the uncles and aunts of Andrew J. Berryhill, the deceased child of George Franklin Berryhill, hereinafter referred to. Thereafter and prior to the final approval of complainant's oil and gas lease, the defendant Kiefer Oil & Gas Company secured a lease of the land for oil and gas purposes from McDougal, and also through a series of intermediate leases or assignments became the owners of the oil and gas leases executed by the McKays to Reese. In April, 1907, the Kiefer Oil & Gas Company entered upon said land and began developing the same, and at the time of the filing of this suit had made extensive developments thereon, and had taken and were taking large quantities of oil therefrom. A receiver has been appointed and is now in charge of the property, pending this litigation.

Since the commencement of this suit, George Franklin Berryhill has filed his bill of intervention herein, asking that the defendants be decreed to have no interest in the lands and that he be decreed the owner in fee, subject only to complainant's oil and gas lease, and that he recover ten per cent, of the oil taken from the land by the defendant Kiefer Oil & Gas Company, and
303 that the deeds and leases under which the defendants claim be declared null and void and may be delivered up and cancelled as a cloud on his title.

In order to understand the contentions of the various parties, it is necessary to briefly review the history of the title of these Creek lands and the legislation affecting them. Early in the last century, by a series of negotiations and treaties between the United States and the Creek tribe of Indians, then residing East of the Mississipi, it was provided that said tribe should remove to lands west of the Mississippi River. By a treaty entered into between the United States and the Creek Indians in 1833 (7 Stat. 417), relative to lands which they had previously selected west of the Mississippi, it was provided that a patent in fee simple to this Nation of Indians covering the lands assigned them West of the Mississippi should be granted them whenever the treaty should be ratified by the President and Senate of the United States, guaranteeing said lands to them, so long as they should exist as a nation and continue to occupy the country thereby assigned to them. Shortly thereafter, patent was granted to the Creek Nation, in accordance with the treaty, covering the lands which we now know as the lands of the Creek Nation, in what was formerly Indian Territory, and

of which the land in controversy was a part. For more than half a century the Creek Nation continued to occupy these lands without any change in their status. During all this time, they existed as a distinct community the boundaries fixed, enjoying the right of local self-government, having their own legislature, their own laws, including laws governing the distribution of the property of the deceased members of the tribe, having their own executive officers, and their own courts. The title to the lands remained in the Nation, each individual enjoying only the possessory right to occupy a certain portion of the tribal domain.

304 But with the lapse of time and the development of the West, came the demand for statehood and the allotment of the tribal lands in the Indian Territory to the individuals of the various nations or tribes, and on March 3rd, 1893, Congress passed the Act providing for what has come to be commonly known as the Dawes Commission, or Commission to the Five Civilized Tribes, (27 Stat. 645). Under the authority of this and subsequent Acts of Congress, the said Commission proceeded to enroll the members of the various tribes, for the purposes of providing a complete and accurate list of the citizens of said Nation, as a basis of allotment. It was provided in the Act creating the Commission just referred to that agreements, looking to the allotment of the lands in severalty among the members of the various tribes, should be entered into with the tribes, and on March 1st, 1901, the Commission and the Creek Nation entered into their first agreement, providing in detail for the allotment in severalty of the Creek lands, commonly known as the original Creek Agreement. (31 Stat. 863) Providing that all the lands of the tribe, except as therein provided, should be allotted among the citizens of the tribe by said Commission, so as to give each an equal share of the whole value, as nearly as might be, and then providing in detail a scheme of allotment. By this agreement, it was further provided:

"Section 28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said roll after the ratification of this agreement.

All citizens who were living on the first day of April, 1899, entitled to be enrolled under Section 21 of the Act of Congress approved June 28, 1898, entitled an Act for the Protection of the People of the Indian Territory and for other purposes, shall be placed upon the rolls to be made by said Commission, under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of

lands and distributive share of all the funds of the tribe, the lands and money, to which he would be entitled if living
305 shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

"All children born to citizens so entitled to enrollment, up to and including the first day of July, 1900, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly."

On June 30th, 1902, another agreement was entered into, which is known as the Supplemental Creek Agreement (32 Stat. 500). This latter agreement was amendatory of the original agreement, and among others, contained the following provisions:

"Section 6. The provision of the Act of Congress approved March 1st, 1901, (the Original Agreement), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed and the descent and distribution of land and money provided for by said act shall be in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation: And, provided, further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to the non-citizen heirs in the order in said Section 49.

"Section 7. All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1st, 1901 (the Original Agreement), subsequent to July 1st, 1900, and up to and including May 25th 1901, and living upon the latter date shall be placed on the rolls made by said commission. And if any such child has died since May 26th, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living, shall descend to his heirs as herein provided and be allotted and distributed to them accordingly."

On the 6th of May, 1901, there was born to George Franklin Berryhill and his wife, Clementine, a son who was named Andrew J. Berryhill. This child died the following November. It will be noted therefore, that at the time of his birth, as well

as at the time of his death, the original Creek agreement was in force, Section 28 of which provided that children born to Creek citizens up to and including the 1st day of July,
306 1900, might be enrolled, but did not provide for the enrollment of children born subsequent to that date, and, therefore, at no time during the life of Andrew J. Berryhill was he entitled to enrollment. But by the Supplemental Agreement, above quoted, he did become entitled to enrollment, for he was born prior to May 25th, 1901, and was living upon that date. On October 8th, 1902, his name was placed upon the approved Creek Indian Roll of the Creek Nation. On April 28th, 1904, selection of his allotment was made, and appears upon the official allotment plat of the Commission, as the "allotment of Andrew J. Berryhill, deceased." On October 10th, 1904, patent, subsequently approved by the Secretary of the Interior, issued from the Creek Nation to "the heirs of Andrew J. Berryhill, deceased," conveying to them the said allotment. The land in controversy is a portion of this allotment.

It is contended by the complainant that the heirs of Andrew J. Berryhill, deceased, acquired title to the lands in controversy by purchase and not by descent; that George Franklin Berryhill, as the nearest in line of succession, acquired an absolute estate in fee simple to the lands in controversy, and that the restriction on the alienation of the lands in controversy did not expire until August 8th, 1907, and that, therefore, the deed under which the defendants Edmond McKay, Perry McKay, and Kiefer Oil & Gas Company claim is void. Complainant further contends that even if the deed from the Berryhills to the McKays and the subsequent leases and conveyances were valid, they were taken with notice of the complainant's lease.

The defendants contend that the only estate George Franklin Berryhill has in the land, if any, is a life estate, and that therefore he cannot make a valid oil and gas lease, and that complainant's lease is therefore void. They further contend that if Berryhill did have such an estate in the land as that he could make a valid lease of, complainants failure to comply with the terms of the lease, as to filing bond, etc., within the time required, followed by lessor's sale of land and notice of rescission, voided the defendant's lease. Defendants further con-
307 tend that they were innocent purchasers in good faith, for value, without notice of complainant's claim.

The intervenor contends that at the time of the alleged sale to the McKays, the land was still subject to restrictions against alienation, and was not "inherited land," and was therefore not relieved of restrictions by the act of April 26, 1906, (34 Stat. 137).

It is conceded that under the provisions of the Supplemental Agreement, the mother, Clementine Berryhill, has no interest in the land, she not being of Creek blood.

We will first consider the question as to whether George Franklin Berryhill was an heir of Andrew J. Berryhill, deceased, and, if so, his interest as such in the land in controversy. If no further legislation had been enacted after the passage of the original agreement, it is clear that the child, Andrew J. Berryhill, would not have been entitled to an allotment, for he was born subsequent to July 1, 1900, but in the Appropriation Act of May 27th, 1902, (.....Stat.....) Congress provided for the enrollment of all children born to members of the tribe, up to and including May 25th, 1901, and then living, and that if any such child should die before receiving his allotment such allotment should descend to his heirs and be distributed to them, according to the laws of Arkansas, it being also provided that the provisions of the original agreement, relative to descent and distribution, according to the laws of the Creek Nation, should be repealed, and providing that the descent and distribution of the lands and money provided for by the original agreement, should be in accordance with the provisions of Chapter 49 of Mansfield's Digest of the Laws of Arkansas. By reference to Section 6 and Section 7 of the Supplemental Agreement, above quoted, it will be observed that the provisions of the Act of May 27th, 1902, just referred to, were incorporated into the Supplemental Agreement. By the Act of Congress of May 2nd, 1890 (.... 308 Stat.....), it was provided that certain laws of the State of Arkansas, as published in Mansfield's Digest of the laws of that State "not locally inapplicable, nor in conflict with this Act, or with any laws of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory, until Congress shall otherwise provide." And among these laws was Chapter 49, relating to descents and distribution. Prior to the Supplemental Agreement, these laws of Arkansas, controlling descent and distribution, were inapplicable to the Creek Nation, as it had its own local laws covering the subject. By the Arkansas law thus adopted, it was provided:

"Section 2522. When any person shall die, having title to any real estate of inheritance, or personal estate not disposed of, * * * * and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, * * * * in the following manner: First, to children or their descendants, in equal parts; Second, if there be no children, then to the father, then to the

mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts, * * etc."

"Section 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall descend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate, in the manner provided in this act; and in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs, as before provided."

"Section 2543. The expression used in this act, "where the estate shall have come to the intestate on the part of the father," or "mother" as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise, or descent from the parent referred to, or from any relative of the blood of such parent."

It must be borne in mind that Andrew J. Berryhill died before the Supplemental Agreement, entitling him to enrollment, became the law, and, therefore, at his death, had no title to the land in controversy. But Section 7 of the Supplemental
309 Agreement, provided for his enrollment even after his death. When enrolled, he became one of the units of allotment as much as though still living, for the roll was the basis for allotment, and there was to be an allotment made for every member appearing upon the roll, either selected by himself, by someone representing him, whether he be living or dead, or in default of such selection, the allotment was to be selected by the Commission.

Here, then, was an allotment, the title to which must pass from the tribe to some individual member or members of the tribe. It could not pass to Andrew J. Berryhill, whose enrollment had caused it to be carved out of the common domain, for he was dead. Section 6 of the Supplemental Agreement provided that the descent of allotments should be in accordance with the Arkansas law, but this allotment could not descend, technically speaking, under the Arkansas law, because the intestate had not died having the title thereto. This would be true of all allotments selected after the death of the person by the enrollment of whom the allotment had been occasioned. In the nature of things, the vast majority of those enrolled would live to receive their allotments, and, consequently, the provisions of Section 6 would govern descent and distribution in all cases except the comparatively few who should die be-

fore allotment. It therefore became necessary for the agreement to provide for the disposition of those allotments not covered by the general provisions of Section 6, and it was therefore added that in such cases the lands and money, to which he (the deceased enrolled member) would be entitled if living, should descend to his heirs as therein provided, and be allotted and distributed to them accordingly. In the cases covered by this provision, the title to the land passed directly from the Creek Nation to the heirs, who, therefore, technically speaking, took the same by "purchase," and not by descent, the title never having vested in the ancestor.

310 "In one thing all writers agree and that is, in considering that there are two modes only, regarded as classes, of acquiring a title to land: Namely, descent and purchase; purchase including every mode of acquisition known to the law except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner, by act of the law."

3rd Washburn on Real Property, p. 4.

It is therefore, in the nature of a grant to the land to which, if living, the deceased enrolled member would be entitled from the Creek Nation to the heirs of such deceased. The question for determination is, Whom did the parties to this agreement mean to include by the term "heirs," and in what proportion did they intend such persons to take? Their intention in this matter must control and this we must gather from the terms of the agreement itself, if clearly expressed, and, if its provisions are [as bigous] and uncertain, then resort must be had to such extraneous light as the provisions of other acts and agreements relating to the same subject and the history and surrounding conditions at the time will afford.

"It is indispensible to a correct understanding of a statute to enquire, first, what is the subject of it, what object is intended to be accomplished by it? When the subject matter is once clearly ascertained, and its general intent, a key it found to all its intricacies;—general words may be restrained to it, and those of narrower import may be expanded to embrace it, to effectuate that intent. When the intention can be collected from the statute, words may be modified, altered, or supplied, so as to obviate any repugnacy or inconsistency with such intention. * * * * * In the Eureka case (4 Sawyer 302 Fed. cases, No. 4548) Mr. Justice Field said: 'Instances without number exist where the meaning of words in a statute has been enlarged or restricted and qualified to carry out the intention of the legislature.' * * * * * Where the meaning of a statute, or any statutory provision

is not plain, a court is warranted in availing itself of all legitimate aids to ascertain the true intention, and among them are some extraneous facts. The objects sought to be accomplished exercises a potent influence in [determing] the meaning of not only the principal but also the minor privisions of a statute. To ascertain it fully, the court will be greatly assisted by knowing, and it is permitted to consider, the mischief intended to be removed or suppressed, or the necessity of any kind which induced the enactment."

Lewis' Sutherland Statutory Construction, Vol. 2, Secs. 347 and 456.

311 By the use of the term "descend," as applied to conditions where descent, technically speaking, could not take place, an uncertainty or an ambiguity is clearly injected into this act, which calls for construction. If it was the intention of the framers of this act that the heirs of enrolled members, dying before allotment, should take the allotments just as if their ancestors had received their allotments before death, then we must look to Chapter 49, as whole, and from that determine not only who the heirs are, but the proportion in which they take. If, on the other hand, it was intended that the person included in the term "heirs", should take merely as "purchasers," and not as though taking technically by descent, then the contention of complainant, that, having determined by reference to the first section of Chapter 49, who the heirs are, the Arkansas law, so far as this class of cases is concerned, has served its purpose, is well supported by authorities.

It must be borne in mind at all times, in constructing these agreements that the purpose, as expressed in the act creating the commission, was to effect the allotment and division of these lands in severalty among the Indians of each Nation or Tribe, upon the basis of justice and equity, to enable the ultimate creation of a state or states of the Union, which should embrace the lands within said territory. The commission was directed to enter upon negotiations with the several nations, and endeavor to procure such allotment of lands in severalty to the Indians belonging to each such nation, tribe or band, respectively, as might be agreed upon as just and proper, to provide for each such Indian a sufficient quantity of land for his or her needs in such equal distribution and apportionment as should be found just and suited to the circumstances. An equal or equitable division of the lands must be made; that is, each member must receive
312 the same treatment with reference to the division of the lands, as every other member occupying the same relative position.

With the foregoing considerations in view, let us examine the act. It is provided that the lands to which Andrew J. Berryhill would have been entitled if living, shall descend to his heirs as "herein provided"; that is "in accordance with chapter 49 of Mansfield's Digest of the Statutes of Arkansas," as provided by Section 6 of the Act. So far, the Act is possible of two constructions, either that the words "as herein provided only have reference to the preceding term heirs," or that they also have reference to the preceding term "descend"; but the act goes farther and provides that such lands shall be allotted to the heirs "accordingly." According to what? Clearly according to the provisions of Chapter 49, above referred to.

If the intention of the law is that the heirs of Andrew J. Berryhill shall be different in person or in the proportion in which they take the land, from what they would have been had he lived until after getting his allotment, and then died, there must have been some reason for this difference, based upon a difference in their status, and that of heirs taking technically by descent; otherwise, the principal of an equitable distribution of the lands would be violated. The only difference in status is, that the ancestor died before the allotment was made instead of afterward. Had Andrew J. Berryhill died one day before the date upon which he might have received his allotment certificate, the disposition of the lands in controversy would have been governed by the portion of the act we are construing; had he died one day after receiving his allotment certificate, no one would contend that the disposition of his land was not governed by the provisions of Chapter 49, both as to who the heirs are and the proportion in which they take. I can perceive no such difference in the status of the heirs of Andrew J. Berryhill and those of an allottee
313 dying after having received his allotment, as would justify or furnish a reason for the distinction claimed. I believe the term "descend" was used in the act for the purpose of bringing this class of cases within the perview of Chapter 49, and that it was intended that they should not take differently from those coming technically within the act. As said by the Circuit Court of Appeals for the 8th Circuit in Ardmore Coal Co. vs. Bevil, 61 Fed. Rep. 757, in construing a statute like this, "it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of a casual reader, but it is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey." In Jones vs. Meham, 175 U. S. 1, it is said: "In construing any treaty between the United States and an Indian tribe, * * * the treaty must * * * be construed, not according to the technical meaning of its words to learned lawyers,

but in the sense in which they would naturally be understood by the Indian." Had it been the intention of the framers of the law that it should be construed as contended for by complainant's counsel, it would have been an easy matter to have made such intention plain. On the other hand, the use of the term "descend" tends to negative such an intention, if it was used with any idea of its ordinary significance.

I am not unmindful of the principle that the contemporaneous construction of an Act of Congress by executive officers called upon to administer it, while not controlling, is ordinarily entitled to much consideration by the courts when called upon to construe such acts, and that the approval of the lease to complainant by the Department of the Interior indicates that that department construed the law as vesting in George Franklin Berryhill a fee simple title to the land in controversy. But this question is now squarely presented to the court for the decision, for the first time, upon a
314 full argument and presentation of authorities pro and con, upon careful consideration of which I am unable to agree with what appears to be the conclusion reached by the department.

It is further to be noted that the very fact that this provision appears in the act makes it clear that the framers realized that without it, the Arkansas law adopted would probably not apply, because of the fact that at the death of the ancestor, the title to the allotment had not passed to him. Realizing this, and the necessity of a special provision to cover such cases, this provision was inserted, specifically applying the Arkansas law to this class of cases.

I therefore conclude that it was the intention of the parties to the Supplemental Agreement that in the case of an enrolled member of the Creek Nation or tribe of Indians, dying before receiving the allotment to which he would have been entitled had he lived until selection was made and certificate issued, his heirs should take in all respects as if such member had not died until after receiving his allotment.

We now come to consider what estate the father, George Franklin Berryhill, acquired in his son's allotment by virtue of the Arkansas law. This law has been fully construed by the Arkansas Supreme Court, in the celebrated case of Kelley vs. McGuire, 15 Arkansas 580, decided long before the adoption of the law here, and consequently is controlling. By reference to Section 2522, it will be seen that as Andrew J. Berryhill died without children or descendants, his estate passed to his father; but to ascertain the extent of interest in the land taken by

the father, reference must also be had to Section 2531, which provides that in the absence of descendents, the estate, if it come by the father, shall ascend to the father and his heirs, and if by the mother, then to her and her heirs; but if it
315 be a "new acquisition" it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate. As said in Kelley vs. McGuire, supra, "the first section (2522) is general and comprehensive, embracing all lands, whether ancestral or newly acquired, subject to certain exceptions, and qualifications hereafter more particularly noticed, and these exceptions refer to real estate alone." The exceptions and qualifications referred to are those contained in Section 2531, distinguishing between newly acquired and ancestral estates. Finally the court in that case reaches a series of conclusions, among which are the following:

"Third: That as to real estate, it was the design of the legislature, where there were no descendents, to point out the lines of the succession, and that this is to depend on the fact whether the inheritance is ancestral or new; and if ancestral, then whether it come from the paternal or maternal line.

Fourth: If the inheritance was ancestral and come from the father's side, then it will go to the line on the part of the father, from whence it came not in postponement, but in exclusion of the mother's line; and so, on the other hand, it if come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

Fifth: If the inheritance be not ancestral, but a new acquisition, then after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncles and aunts, etc. * *"

The question, then, is, whether these allotments are new acquisitions or ancestral states in the lands of the original allottee. The distinction between these two classes of estates is clearly and tersely stated by the court in Kelley vs. McGuire, as follows:

"It must be understood, however, that a new acquisition in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry or by will or deed from a stranger. In other words, it is an estate derived from any source other than descent, devise, or gift from father or mother or any relative in the paternal or maternal line. * * Land is to be considered as having come from or by or on the part of the father or mother when it comes by gift, devise, or

descent, either mediately or immediately from them or
316 from any person in their respective line."

We find the title to these lands originally passing by patent from the United States to the Creek Nation or tribe of Indians, a distinct community or political entity, having the right of local self-government, and long recognized as in a sense a state, although not a foreign state or state of the Union.

Such was the condition of the Creek Nation at the time it received the patent for these lands, and such it continued to be at the time the laws and agreements now being considered Cherokee were created. The patent from the United States to the Creek Nation conveys to that Nation the same character of title to the lands that nation occupies as that conveyed by the patent to the Creek Nation. In reference to the Cherokee patent, the Supreme Court of the United States said, in Cherokee Nation vs. Journeycake, 155 U. S. 196,

"By that patent, whatever of title was conveyed was conveyed to the Cherokees as a Nation, and no title was vested in severalty to the Cherokees or any of them."

Therefore, no title in severalty is vested in any Creek citizen, and in no sense can the title to any allotment be said to have come to any allottee by or on the part of his mother or father.

I see no reason why the individual members of the Creek Nation do not bear practically the same relation to the Nation as a political entity as the individual citizens of the United States bear to the United States government, so far as a consideration of such relationship will throw light upon this question. The Supreme Court of Arkansas, in the case of Hogna vs. Findley, 11 S. W. 1035, held that public land entered by a settler and for which he received patent from the United States, became in such settler's hands a "new acquisition" as the term is used in the Arkansas law we are now considering, saying: "The land in controversy was a new acquisition by Thomas V. Taylor, and upon his death, is passed
317 first to his father, and then to his mother for life." If, then, the assumption is correct that the individual member of the Creek Nation stands in the same relation to that nation as the individual citizen of the United States does to that Government, so far as the title to national or public lands is concerned, it seems clear that an allotment acquired by patent from the Creek Nation becomes as much a new acquisition as a homestead acquired by patent from the United States. It is true that Andrew J. Berryhill acquired his status as a Creek

citizen by virtue of the Creek blood of his father, but, as suggested by defendant's counsel, in a great number of instances both the father and mother of the allottee are citizens by blood, and the allottee acquires his right through the blood of both equally. If we were to adopt this theory and declare the estate ancestral, then having come by both the father and the mother, each would be equally entitled to it in case of the allottee's death intestate without descendants, and a condition would be presented not provided for by the law.

I therefore conclude that the allotment of Andrew J. Berryhill was, in contemplation of law, a new acquisition, and that his father, George Franklin Berryhill, acquired only a life estate. Having but a life estate, he could not execute a valid oil and gas lease thereon.

"A tenant for life, of lands containing minerals, oil or gas, cannot open any new mines or wells, or lease the lands to others for this purpose."

16 Cyc 625, Marshal vs. Mellon (Pa.) 35 LRA 816 Gerkins vs. Ky. Salt Co., 100 Ky. 734, 66 Amer. State Repts. 370, Hook vs. Garfield Coal Co. (Iowa) 83 NW 963.

It follows that the lease relied upon by complainant, executed by George Franklin Berryhill, the life tenant, and Clementine Berryhill, his wife, who is conceded to have no title, is invalid and conveys no interest to the complainant as against the defendants herein.

318 We now pass to the contention of the intervenor that the land in controversy was not "inherited" land in the hands of George Franklin Berryhill in the sense in which that term is used in the Act of April 26, 1906, 34 Stat. 137, removing restrictions from certain inherited lands of the Five Tribes. The Act provides:

"Section 22. That the adult heir of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent."

Then follows certain provisions as to sales by full blood and minor heirs.

If the term "inherited" is to be confined to its strict literal signification, it cannot apply to the land in controversy in this case, and the contention of the intervenor must be sustained.

As said in McArthur vs. Scott, 113 U. S. 1027, "the word 'inherited' which is applied to real estate only, implies taking immediately from the testator as heirs take immediately from their ancestor, upon his death." The act in which this provision is found is but one of a series of acts and agreements all having in view the abolishing of the tribal governments preparatory to statehood, and an equitable division of the lands and money of each tribe among its individual members. This act, therefore, must be read and construed, in connection with all the other acts and agreements relating to the same subject.

(Lewis' Sutherland Stat. Construction, Sec. 443.)

The reference to inherited lands in this act, implies some law theretofore in existence, providing for the descent of lands. As said in Starr vs. Hamilton, 22 Fed. Cases 1107, "the term inheritance is in legal parlance the exact equivalent of descents." As applied to the Creek Nation, it has reference to lands inherited under the terms of the original and supplemental
319 agreements. The land in controversy passed by the terms of the Supplemental Agreement. The Act of 1906 and the Supplemental Agreement must be construed together. We have decided that by the use of the term "descend" in the Supplemental Agreement, it was intended that lands of a member dying before receiving his allotment, should, in contemplation of law, descend to his heirs in all respects as though title to the allotment had vested in him before his death. If that be true, then, in contemplation of law, such lands become inherited lands in the hands of the heirs, and construing the act of 1906, as we must, in connection with the Supplemental Agreement, the term "inherited lands," must be held to apply as well to lands passing to heirs of members dying before allotment as to lands passing by technical descent from members dying after allotment. I can conceive no reason why any distinction should be made between the two classes of lands referred to. The purpose of imposing restrictions in the first place was to protect the people presumably incompetent to deal with their own lands without some supervision. Congress has seen fit in this act to remove such restrictions from that class of lands termed "inherited lands," subject to certain conditions as to full bloods and minors, presumably considering that such measure of protection as Congress still deems necessary to afford the Indians, can be exercised without longer imposing restrictions on this class of lands. But what possible reason could be suggested for continuing the restrictions on lands coming to the heirs as the land in controversy came to the intervenor, and removing them with reference to lands coming to heirs technically by descent? Certainly none can be suggested. If the

Act of 1906 stood alone, it might, with considerable force, be contended that its terms with reference to this matter are clear, and do not call for construction and must, therefore, be
320 literally construed. But this Act, as we have seen, must be considered together with all other cognate acts. There being no reason for such a distinction, and no such distinction having [having] been intended in the Supplemental Agreement, I conclude that the term "inherited lands," as applied to the Creek Nation, applies to all allotments selected by or for deceased members of the tribe, in the hands of their heirs, whether such deceased members died before or after receiving such allotments.

It follows that by his deed to the McKays, George Franklin Berryhill, the intervenor, divested himself of all his title in the land in controversy.

Having decided that complainant's lessors had not such interest in the land as enabled them to make a valid oil and gas lease, and that the intervenor's deed to the McKays divested him of all his title to the land, the other points raised at the trial become immaterial to a determination of this case.

A decree will be entered for the defendants with costs taxed against the complainant and the intervenor.

321 And afterwards, on June 2nd, 1908, the same being a day of the regular June 1908 term of said Court, said Court rendered and caused to be entered of record its judgment and decree, in said cause, which is as follows, to-wit:

322 In the United States Circuit Court for the Eastern District of the State of Oklahoma, Sitting at South McAlester.

Albert W. Shulthis, Complainant,

vs.

D. A. MacDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company, Defendants,

George Franklin Berryhill, Intervenor.

Final Decree.

This cause came on to be heard before the Honorable Ralph E. Campbell, holding the United States Circuit Court for the Eastern District of Oklahoma at Tulsa on the 6th day of April, 1908, the same being a day of the regular April term of said Court, upon the whole record and the argument of counsel, and the cause taken under advisement by the Court, whereupon on May 30, 1908, the same being the last day of the regular April term of the said Court at Tulsa, this case was

transferred and continued to the June term of the said United States Circuit Court at South McAlester, Oklahoma, upon order entered as per stipulation of counsel, filed, by which it was agreed and accordingly entered that this case should be decided and decree entered at the June term of said Court at South McAlester, and now accordingly upon this June 2, 1908, the same being a regular day of the June term of the said Court at South McAlester, this cause came on for further hearing and final decree, from consideration of all of which it ap-
323 pears to the Court that the equities and causes of action alleged in the complainant's bill are fully met and denied by the answer of defendants and not sustained by the proof and not sustained by the law and equity of the cause; and from all of which it further appears to the Court that the equities and causes of action set up by the intervenor, George Franklin Berryhill in his intervening petition are fully met and denied by the answer of defendants to the same and not sustained by the law and equity of the case; Wherefore, it is therefore ordered, adjudged, decreed and considered by the Court that complainant's bill be dismissed and that the complainant, Albert W. Shulthis, and his sureties, Frank A. Gillespie and Jesse I. Gillespie, and the intervenor, George Franklin Berryhill, pay all the costs of this cause, for which let execution issue. And it is further ordered, adjudged, considered and decreed by the Court that the receiver, G. F. Mahan, heretofore appointed under order of this Court made and entered, immediately and forthwith turn over to the defendants the possession of the land in controversy, together with all the improvements thereon and unsold oil, to-wit; the NE/4 of the NW/4 of Section 18, Township 17 North, Range 12 East, of the Indian Base and Meridian in Oklahoma, and forthwith, and on or before the 20th day of June, 1908, the same being a day of this Court, report all of his actions and doings had since the filing of his last report, and said receiver will show in said report all moneys and funds in his hands and all oil on hand unsold turned over by him to defendants.

RALPH E. CAMPBELL, Judge.

324 And thereafter, on the 9th day of June, 1908, the same being a regular day of the regular June, 1908, term of said Court, the appellant Albert W. Shulthis files herein his petition for an order of appeal and assignment of errors, which said petition and assignment of errors are in words and figures as follows:

325 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Petition for Allowance of Appeal with Supersedas.

To the Honorable Ralph E. Campbell Judge of said Court:

The above named complainant feeling himself aggrieved by the decree made and entered in this cause on the 2nd day of June, 1908, does hereby appeal from said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors, which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated may be sent to the United States Circuit Court of Appeals for the Eighth Circuit; and desiring to supersede the execution of the decree, petitioner here tenders bond in such amount as the Court may require for such purpose, and prays that with the allowance of the appeal supersedas be issued.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant, Albert W. Shulthis.

The foregoing petition is granted and the appeal allowed and shall operate as a supersedas upon the petitioner filing a bond in the sum of $10,000.00, with sufficient sureties to be conditioned as required by law said bond to be approved by the clerk of this court. Done this 9th day of June, 1908.

RALPH E. CAMPBELL, Judge.

326 Petition indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, et al., Defendants. Petition for Allowance of Appeal with Supersedeas. Filed June 9, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. Thomas & DeMeules for Complainant.

327 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Assignment of Errors.

And now on this 9th day of June, 1908, came the complainant, by his solicitors C. L. Thomas and Edgar A. DeMeules, and says that the decree entered in the above cause on the 2nd day of June, 1908, is erroneous and unjust for the following reasons as shown by the assignment of errors here set out, to-wit:

First.

The Court erred in dismissing the bill of complaint filed by the complainant herein, Albert W. Shulthis, on the 28th day of December, 1907.

Second.

The Court erred in not entering a decree in this cause adjudging the rights and liabilities of all the parties as prayed in the bill of complaint filed herein by the said Albert W. Shulthis.

Third.

The Court erred in failing and refusing to hold and adjudge the complainant to have by virtue of the lease executed and delivered to him by George Franklin Berryhill on March
328 24, 1906, as shown by the record, the sole and exclusive right as lessee to all and singular the oil and natural gas deposits in and under the tract of land in controversy, with the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas, and to use so much of the surface of said land as may be reasonably necessary to carry on the working, prospecting for, extracting, piping, storing, refining and removing such oil and natural gas including also the right to obtain from wells or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas for fuel so far as it is necessary to the prosecution of said operations and generally to have all things secured to him under and by virtue of said lease.

Fourth.

The Court erred in holding and adjudging that the oil and gas mining lease, executed and delivered on March 24, 1906, by George Franklin Berryhill and Clementine Berryhill to Albert

W. Shulthis, was void and conveyed no interest to the complainant Albert W. Shulthis as against the defendants herein.

Fifth.

The Court erred in holding and adjudging that the said George Franklin Berryhill acquired only an estate for his lifetime in and to the lands in controversy.

Sixth.

The Court erred in failing and refusing to hold and adjudge that at the time of the execution and delivery by George Franklin Berryhill and Clementine Berryhill of the oil and gas mining lease to Albert W. Shulthis, as shown by the record, that the said George Franklin Berryhill was seized of an estate in fee simple in and to the lands in controversy.

Seven.

The Court erred in not holding and adjudging that the defendants and each of them have no interest, estate or
329 property in or to the deposits of oil and gas in and under the lands in controversy.

Eight.

The Court erred in failing and refusing to enjoin and restrain the defendants, and each of them, from prospecting upon or drilling the lands in controversy for oil or natural gas, or from extracting any oil or gas from said lands, and from asserting any interest in or to said lands adverse and hostile to the interest and title of the complainant, Albert W. Shulthis.

Nine.

The Court erred in failing and refusing to hold and adjudge that George Franklin Berryhill as the heir nearest in the line of succession to Andrew J. Berryhill, deceased, acquired an absolute estate in fee simple in and to the lands in controversy.

Ten.

The Court erred in holding and adjudging that the term "inherited lands," as applied to the Creek Nation, applies to all allotments selected by or for deceased members of the tribe in the hands of their heirs whether said deceased members died before or after receiving such allotment.

Eleven.

The Court erred in not holding and adjudging that the warranty deed, as shown by the record, executed on the 5th day of June, 1906, by George Franklin Berryhill and Clementine

Berryhill, father and mother of Andrew J. Berryhill, deceased, to Edmond McKay and Perry McKay, covering the lands in controversy, was void and that no interest passed thereby.

Twelve.

The Court erred in failing and refusing to hold and adjudge that the several leases and conveyances as shown by the record, and under which the defendants claim, were executed and delivered with full notice and knowledge of the execution and delivery of the oil and gas mining lease executed and de-
330 livered by George Franklin Berryhill and Clementine Berryhill on the 24th day of March, 1906, to the said Albert W. Shulthis.

Thirteen.

The Court erred in holding and adjudging that the restrictions on the alienation of the land in controversy were removed by the provisions of Section 22 of an Act of Congress approved April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

Fourteen.

The Court erred in failing and refusing to hold and adjudge that at the time of the execution of the warranty deed by George Franklin Berryhill and Clementine Berryhill his wife, to Edmond McKay and Perry KcKay on June 5, 1906, as shown by the record, that the said George Franklin Berryhill and Clementine Berryhill had no legal capacity to convey the land in controversy.

Fifteen.

The Court erred in failing and refusing to hold and adjudge that the warranty deed, as shown by the record executed on the 5th day of June, 1906, by George Franklin Berryhill and Clementine Berryhill to Edmond McKay and Perry McKay covering the land in controversy, was void, and that no interest passed thereby.

Sixteen.

The Court erred in holding and adjudging that section No. 2531 of Mansfield's Digest of the Statutes of the State of Arkansas, governed the amount, quantity, quality and the manner of taking of the estate in the lands in controversy, that became vested in George Franklin Berryhill under and by virtue of the patents issued to the "heirs of Andrew J. Berryhill, deceased," by the United States and the Creek Nation, as shown by the record.

Seventeen.

331 The Court erred in failing and refusing to hold and adjudge that under and by virtue of Section 2522 of Mansfield's Digest of the Statutes of Arkansas, George Franklin Berryhill as the father of Andrew J. Berryhill, deceased, was seized of an estate in fee simple in the lands in controversy under and by virtue of the patents, as shown by the record, issued to the "heirs of Andrew J. Berryhill, deceased" by the United States and the Creek Nation.

Eighteen.

The Court erred in holding and adjudging that the lands in controversy are to be treated as a new acquisition in the hands of Andrew J. Berryhill, deceased.

Nineteen.

The Cout erred in holding and adjudging that the lands in controversy are to be taken as though they had come to the "heirs of Anrew J. Berryhill, deceased," by descent.

Twenty.

The Court erred in holding and adjudging that the lands in controversy were alloted to Andrew J. Berryhill, deceased.

Twenty-one.

The Court erred in failing and refusing to hold and adjudge that the lands in controversy were allotted by the United States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased.

Twenty-two.

The Court erred in dismissing and discharging the receiver heretofore appointed in this cause.

Twenty-three.

The Court erred in failing and refusing to order and adjudge that an accounting be had between the parties to this cause.

Twenty-four.

332 The Court erred in failing and refusing to hold and adjudge the oil and gas mining lease executed and delivered on the 24th day of March, 1906, by George Franklin Berryhill and Clementine Berryhill, lessors, and Albert W. Shulthis, lessee, covering the lands in controversy, to be superior and prior in its operation and effect to the oil and gas mining lease executed and delivered on the 12th day of October, 1906, by Edmond McKay, Perry McKay, Florence McKay and Gusta McKay, lessors, and Arthur B. Reese, lessee.

Twenty-five.

The court erred in failing and refusing to adjudge to the complainant, Albert W. Shulthis, damages in the sum of Twenty Five Thousand ($25,000.00) Dollars, as prayed in the bill of complaint.

Twenty-six.

The Court erred in ordering and adjudging that the costs of this suit be taxed against the complainant, Albert W. Shulthis.

Wherefore, The complainant prays that the said degree be reversed, and that the Circuit Court of Appeals for the Eighth Circuit render a proper decree on the record.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant.

Assignment of Errors Indorsed: Equity No. 1. Albert W. Shulthis, Complainant vs. D. A. McDougal, et al, Defendants. Assignment or Errors. Filed Jun 9 1908. L. G. Disney Clerk U. S. Circuit Court Eastern Dist. Okla. Thomas & DeMeules for Complainant.

And thereafter, and on June 11th, 1908, there was filed with the Clerk of this Court, a bond on appeal with supersedeas, which bond is in words and figures as follows:

333 In the United States Circuit Court for the Eastern District of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1 vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Bond on Appeal.

Know All Men By These Presents:

That we, Albert W. Shulthis, as principal, and Frank A. Gillespie and Jessie I. Gillespie as sureties, acknowledge ourselves to be jointly indebted to D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company and George Franklin Berryhill, appellees in the above cause in the sum of Ten Thousand Dollars ($10,000.00), condition that, whereas, on the 2nd day of June, 1908, in the Circuit Court of the United States for the Eastern District of Oklahoma, in a suit depending in that Court, wherein Albert W. Shulthis was complainant and D. A. McDougal, Edmond McKay, Perry McKay and The

Kiefer Oil and Gas Company were defendants, and George Franklin Berryhill was intervenor, numbered on the equity docket as 1, a decree was rendered against the said Albert W. Shulthis, and the said Albert W. Shulthis having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit, and filed a copy thereof in the office of the Clerk of the Court to reverse said decree, and a citation directed to the said D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company, and George Franklin Berryhill, citing and admonishing them to be and appear at a session of the
334 United States Circuit Court of Appeals to be holden in the city of St. Louis, in the State of Missouri, on the .... day of December, A. D. 1908, next.

Now, if the said Albert W. Shulthis shall prosecute his appeal to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ALBERT W. SHULTHIS,
Principal.
FRANK A. GILLESPIE,
JESSIE I. GILLESPIE,
Sureties.

Approved this 11 day of June, 1908.

L. G. DISNEY, Clerk.

OK Ramsey.

Bond Indorsed: Equity No. 1. Albert W. Shulthis, Complainant vs. D. A. McDougal et al, Defendants. Bond on Appeal. Filed June 11, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. Thomas & De Meules for Complainant.

And thereafter, on the 9th day of June, 1908, the same being a day of the regular June, 1908, term of said Court, Appellant, George Franklin Berryhill filed herein a petition for an allowance of appeal and assignment of errors, which said petition and assignment of errors are in words and figures as follows:

In the United States Circuit Court for the Eastern Dis-
335 trict of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.
George Franklin Berryhill, Intervenor.

Petition for Allowance of Appeal.

To the Honorable Ralph E. Campbell, Judge of said Court:

The above named intervenor, George Franklin Berryhill, feeling himself aggrieved by the decree made and entered in this cause, on the 2nd day of June, 1908, does hereby appeal from

said decree to the Circuit Court of Appeals for the Eighth Circuit, for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that the citation issue as provided by law, and that a transcript of the record, proceedings and papers upon which said decree was based, duly authenticated, may be sent to the Circuit Court of Appeals for the Eighth Circuit.

S. V. O'HARE,
F. L. McCAIN,
Solicitors for Intervenor and Appellant,
George Franklin Berryhill.

The foregoing petition is granted and the appeal allowed upon giving bond conditional as required by law, in the sum of $250.-00, said bond to be approved by the clerk of this court.

Dated this 9th day of June, 1908.

RALPH E. CAMPBELL, Judge.

Petition Indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, et al, Defendants. George Franklin Berryhill, Intervenor. Petition for Allowance of Appeal. Filed Jun. 9, 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla. O'Hare & McCain for Intervenor.

336 In the United States Circuit Court for the Eastern District of the State of Oklahoma, At Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and the Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Intervenor's Assignment of Errors.

And now on this 9th day of June, 1908, came the intervenor George Franklin Berryhill by his solicitors S. V. O'Hare and F. L. McCain, and says that the decree entered in the above cause on the 2nd day of June, 1908, is erroneous and unjust for the following reasons as shown by the assignment of errors here set out, to-wit:

First.

The Court erred in dismissing the bill of intervention filed by the intervenor herein, George Franklin Berryhill, on the 14th day of March, 1908.

Second.

The Court erred in not entering a decree in this cause adjudging the rights and liabilities of all the parties hereto, to

be as prayed in the bill of intervention filed herein by the said George Franklin Berryhill.

Three.

The Court erred in failing and refusing to hold and adjudge the defendants to have no interest or estate whatsoever, in the lands in controversy or in any part thereof.

337 Fourth.

The Court erred in failing and refusing to hold and adjudge that the intervenor George Franklin Berryhill, is seized of a good and valid estate in fee in the lands in controversy, subject only to the oil and gas mining lease upon said lands, executed and delivered by the intervenor and Clementine Berryhill to the complainant on the 24th day of March, 1906, as shown by the record.

Fifth.

The Court erred in failing and refusing to hold and adjudge that the receiver apointed in this cause pay to the intervenor a sum equal to ten percent of the value of all crude oil extracted by him from the lands in controversy.

Sixth.

The Court erred in failing and refusing to hold and adjudge that the defendant Kiefer Oil and Gas Company pay to the intervenor George Franklin Berryhill a sum equal to ten percent of the value of all crude oil extracted from the lands in controversy, by the said Kiefer Oil and Gas Company.

Seven.

The Court erred in holding and adjudging that the intervenor acquired only an estate for his lifetime in and to the lands in controversy.

Eight.

The Court erred in failing and refusing to hold and adjudge that the defendants and each of them, have no interest, estate or property in or to the deposits of oil and gas in and under the lands in controversy.

Nine.

The Court erred in failing and refusing to hold and adjudge that the intervenor George Franklin Berryhill as the heir nearest in the line of succession to Andrew J. Berryhill, deceased, acquired an absolute estate in fee simple in and to the
338 lands in controversy.

Ten.

The Court erred in holding and adjudging that the term "inherited lands" as applied to the Creek Nation, applies to

all allotments selected by or for deceased members of the tribe in the hands of their heirs whether said deceased members died before or after such allotment.

Eleven.

The Court erred in holding and adjudging that the warranty deed, as shown by the record, executed on the 5th day of June, 1906, by the intervenor and Clementine Berryhill his wife, to Edmond McKay and Perry McKay was the valid deed of the grantors therein.

Twelve.

The Court erred in failing and refusing to hold and adjudge that the warranty deed, as shown by the record executed on the 5th day of June, 1906, by the intervenor George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, to Edmond McKay and Perry McKay, covering the lands in controversy was void and that no interest passed thereby.

Thirteen.

The Court erred in holding and adjudging that the restrictions on the alienation of the land in controversy were removed by the provisions of section 22 of an Act of Congress approved April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes.

Fourteen.

The Court erred in failing and refusing to hold and adjudge that at the time of the execution of the warranty deed by the intervenor George Franklin Berryhill and Clementine Berryhill his wife, to Edmond McKay and Perry McKay, on June 5th, 1906, as shown by the record, that the said George
339 Franklin Berryhill and Clementine Berryhill had no legal capacity to convey the land in controversy.

Fifteen.

The Court erred in failing and refusing to hold and adjudge that the warranty deed, as shown by the record executed on the 5th day of June, 1906, by the intervenor George Franklin Berryhill and Clementine Berryhill to Edmond McKay and Perry McKay, was void and that no interest passed thereby.

Sixteen.

The Court erred in holding and adjudging that section No. 2531 of Mansfield's Digest of the Statutes of the State of Arkansaw, governed the amount, quantity, quality and the man-

ner of taking of the estate in the lands in controversy, that became vested in George Franklin Berryhill under and by virtue of the patents issued to the "heirs of Andrew J. Berryhill, deceased," by the United States and the Creek Nation, as shown by the record.

Seventeen.

The Court erred in failing and refusing to hold and adjudge that under and by virtue of Section No. 2522 of Mansfield's Digest of the Statutes of Arkansaw, George Franklin Berryhill as the father of Andrew J. Berryhill, deceased, was siezed of an estate in fee simple in the lands in controversy under and by virtue of the patents, as shown by the record, issued to "the heirs of Andrew J. Berryhill, deceased" by the United States and the Creek Nation.

Eighteen.

The Court erred in holding and adjudging that the lands in controversy are to be treated as a new acquisition in the hands of Andrew J. Berryhill, deceased.

Nineteen.

The Court erred in holding and adjudging that the lands in controversy are to be taken as though they had come to the "heirs of Andrew J. Berryhill, deceased" by descent.

340 Twenty.

The Court erred in holding that the lands in controversy were allotted to Andrew J. Berryhill, deceased.

Twenty-one.

The Court erred in failing and refusing to hold and adjudge that the lands in controversy were allotted by the United States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased."

Twenty-two.

The Court erred in failing and refusing to declare null and void as clouds upon the title of this intervenor to the lands in controversy various leases and conveyances, as shown by the record, under which the defendants and each of them claimed.

Twenty-three.

The Court erred in failing and refusing to hold that Martha Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mar Kiefer, Josie Morton and Airy Ann Berryhill had at no time any interest or estate in or to the lands in controversy.

Twenty-four.

The Court erred in ordering and adjudging that the costs in this suit be taxed against the intervenor George Franklin Berryhill.

Twenty-five.

The Court erred in dismissing and discharging the receiver heretofore appointed in this cause.

Wherefore, The Intervenor prays that said decree be reversed, and that the Circuit Court of Appeals for the Eighth Circuit render a proper decree on the record.

S. V. O'HARE,
F. L. McCAIN,
Solicitors for Intervenor, George Franklin Berryhill.

341 Assignment of Errors Indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, et al. Defendants. George Franklin Berryhill, Intervenor. Assignment of Errors. Filed Jun 9, 1908. L. G. Disney Clerk U. S. Circuit Court Eastern Dist. Okla. O'Hare & McCain For Intervenor.

And thereafter, on June 11, 1908, there was filed with the Clerk of this Court, and approved by the said clerk a bond on appeal, which is in words and figures as follows:

In the United States Circuit Court for the Eastern Dis-
342 trict of the State of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
No. 1. vs. Equity.
D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Bond on Appeal.

Know all Men by these Presents: That we, George Franklin Berryhill as principal, and Guy T. Berry and Ernest Sewell as sureties, acknowledge ourselves to be jointly indebted to D. A. McDougal, Edmond McKay, Perry McKay, The Kiefer Oil and Gas Company appellees, and Albert W. Shulthis, complainant in the above entitled cause in the sum of Two Hundred Fifty Dollars ($250.00), condition that, whereas, on the 2nd day of June, 1908, in the Circuit Court of the United States for the Eastern District of Oklahoma, in a suit depending in that Court, wherein Albert W. Shulthis was complain-

ant and D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company were defendants, and George Franklin Berryhill was intervenor, numbered on the equity docket as 1, a decree was rendered against the said George Franklin Berryhill, and the said George Franklin Berryhill having obtained an appeal to the Circuit Court of Appeals for the Eighth Circuit and filed a copy thereof in the office of the Clerk of the Court to reverse said decree, and a citation directed to the said Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay and the Kiefer Oil and Gas Company citing and admonishing them to be and appear at a session of the United States Circuit Court of
343 Appeals to be holden in the city of St. Louis, in the State of Missouri, on the .... day of December, A. D. 1908 next.

Now, if the said George Franklin Berryhill shall prosecute his appeal to effect and answer all costs if he fail to make his plea good, then the above obligation be void, else to remain in full force and virtue.

GEORGE FRANKLIN BERRYHILL,
By F. L. McCain, Atty.,
Principal.
GUY T. BERRY,
ERNEST SEWELL,
Sureties.

Approved this 11th day of June, 1908.

L. G. DISNEY,
Clerk.

O K
Ramsey.

344 Bond on Appeal indorsed: Equity No. 1. Albert W. Shulthis, Complainant. D. A. McDougal, et al, Defendants. George Franklin Berryhill, Intervenor. Bond on Appeal. Filed June 11, 1908. L. G. Disney Clerk U. S. Circuit Court Eastern Dist. Okla. O'Hare & McCain For Intervenor.

345 And afterwards and on June 22, 1908, there was filed with the Clerk of this Court, a stipulation in words and figures as follows:

In the United States Circuit Court for the Eastern District of Oklahoma, at Muskogee.

Albert W. Shulthis, Complainant,
Equity vs. No. 1.
D. A. McDougal, Edmond McKay, Berry McKay and Kiefer Oil and Gas Company, Defendants.

George Franklin Berryhill, Intervenor.

Stipulation.

It is hereby [stipulation] and agreed by and between the parties hereto, by their solicitors of record, that the following may be omitted from the transcript of the record on appeal in this cause:

1. Motion for appointment of receiver, filed Jan. 31, 1908.

2. Order denying receiver, filed Jan. 31, 1908.

3. Affidavits in support of motion for appointment of receiver, filed Jan. 31, 1908.

4. Stipulation of counsel that order of Jan. 31, 1908, denying motion for receiver, may be set aside, filed Feb. 21, 1908.

5. Order setting aside said order of Jan. 31, 1908, filed Feb. 21, 1908.

6. Bond of receiver.

7. Statement of expenses and disbursements of Kiefer Oil [Oil] and Gas Co., filed Feb. 26, 1908.

8. Cost bond of complainant, filed Feb. 29, 1908.

9. Oath of receiver, filed March 16, 1908.

10. Motion of receiver, filed March 23, 1908.

11. Order granting prayer of receiver's motion, filed March 23, 1908.

12. Exhibits "B", "C" and "D" to the agreed statement of facts, filed with the special examiner, Feb. 5, 1908.

346 13. Exhibit "B" to Defendants' proof, same [bening] shown by Exhibit "B" to defendants' answer to the bill of complaint.

C. L. THOMAS,
EDGAR A. DeMEULES,
Solicitors for Complainant.

GEO. S. RAMSEY,
P. C. WEST,
Solicitors for Defendants.

S. V. O'HARE,
F. L. McCAIN,
Solicitors for Intervenor George Franklin Berryhill.

Sipulation indorsed: Equity No. 1. Albert W. Shulthis, Complainant, vs. D. A. McDougal, et al., Defendants. Stipula-

tion. Filed Jun 22 1908. L. G. Disney, Clerk U. S. Circuit Court Eastern Dist. Okla.

347 In the United States Circuit Court for the Eastern District of the State of Oklahoma.

I, L. G. Disney, Clerk of the Circuit Court of the United States for the Eastern District of Oklahoma, in the Eighth Circuit, do hereby certify that the foregoing is a true and correct copy of the record, assignment of errors and proceedings had in cause No. 1, Equity, wherein Albert W. Shulthis is Complainant, and D. A. McDougal, Edmond McKay, Perry McKay and the Kiefer Oil and Gas Company are defendants, and George Franklin Berryhill is Intervenor, as fully as the same remains on file and of record in my office at Muskogee, Oklahoma, except that certain portions thereof are omitted by the stipulation and agreement of the counsel for the parties to this cause, said omitted portions being shown by the stipulation last hereinbefore set out.

Seal U. S. Circuit Court, Eastern District of Oklahoma.

Witness my hand officially and the seal of said Court at Muskogee, Oklahoma, the 1st day of July, A. D., 1908.

L. G. DISNEY,
Clerk United States Circuit Court for the Eastern District of Oklahoma.

No. 2901. Filed July 3, 1908. John D. Jordan, Clerk.

No. 2905. Filed July 14, 1908. John D. Jordan, Clerk.

(*Appearance of Mr. C. L. Thomas and Mr. Edgar A. De Meules as Counsel for Appellant in Cause No.* 2901.)

And on the seventh day of July, A. D. 1908, the appearance of Mr. C. L. Thomas and Mr. Edgar A. De Meules, as counsel for appellant was filed in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al.

The Clerk will enter my appearance as Counsel for the Appellant.
C. L. THOMAS,
EDGAR A. DE MEULES,
Muskogee, Okla.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, et al. Appearance. Filed Jul- 7, 1908, John D. Jordan, Clerk. C. L. Thomas, Edgar A. De Meules, Counsel for Appellant.

(*Appearance of Mr. George S. Ramsey as Counsel for Appellees in Cause No.* 2901.)

And on the second day of September, A. D. 1908, the appearance of Mr. George S. Ramsey, as counsel for appellees was filed in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al.

The Clerk will enter my appearance as Counsel for the Appellees.
GEO. S. RAMSEY.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, et al. Appearance. Filed Sep. 2, 1908, John D. Jordan, Clerk. George S. Ramsey, Counsel for Appellees.

(*Appearance of Mr. Preston C. West as Counsel for Appellees in Cause No.* 2901.)

And on the second day of September, A. D. 1908, the appearance of Mr. Preston C. West, as Counsel for Appellees was filed in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. McDOUGAL et al.

The Clerk will enter my appearance as Counsel for the Appellees.
PRESTON C. WEST.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, et al. Appearance. Filed Sep. 2, 1908, John D. Jordan, Clerk. Preston C. West, Counsel for Appellees.

(*Appearance of Mr. S. V. O'Hare as Counsel for Appellees in Cause No.* 2901.)

And on the seventh day of September, A. D. 1908, the appearance of Mr. S. V. O'Hare, as counsel for the appellees was filed in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. McDOUGAL et al.

The Clerk will enter my appearance as Counsel for the Appellees.
S. V. O'HARE.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, et al. Appearance. Filed Sep. 7, 1908. John D. Jordan, Clerk. S. V. O'Hare, Counsel for Appellees.

(*Argument Commenced in Cause No.* 2901.)

And on the twelfth day of January, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an entry in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

TUESDAY, *January* 12, 1909.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause having been called for hearing in its regular order, argument was commenced by Mr. C. L. Thomas in behalf of the appellant, and the hour for adjournment having arrived before the conclusion thereof, the further hearing of this cause was postponed until tomorrow.

(*Order of Submission in Cause No.* 2901.)

And on the thirteenth day of January, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

WEDNESDAY, *January* 13, 1909.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause having been called this day for further hearing, argument was continued by Mr. C. L. Thomas and Mr. Edgar A. De Meules for the appellant and concluded by Mr. George S. Ramsey for the appellees.

Thereupon the cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of June, A. D. 1909, the opinion of the United States Circuit Court of Appeals for the Eighth Circuit was filed in said Causes Nos. 2901 and 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, A. D. 1909.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al., Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 2905. May Term, A. D. 1909.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al., Appellees.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Mr. C. L. Thomas and Mr. Edgar A. De Meules appeared for Albert W. Shulthis.

Mr. George S. Ramsey, (Mr. P. C. West and Mr. N. A. Gibson were with him on the brief), appeared for D. A. McDougal, et al.

Mr. S. V. O'Hare, (Mr. F. L. McCain was with him on the brief), appeared for George Franklin Berryhill, Intervener.

Before Hook, Circuit Judge, and Riner and Amidon, District Judges.

AMIDON, District Judge, delivered the opinion of the court.

This is a suit in equity brought by the appellant to determine conflicting rights to a parcel of real property situated in Oklahoma. While the cause was pending, George Franklin Berryhill was permitted to file a petition in intervention therein, and make common cause with the complainant. The decree below dismissed the bill upon the merits. The case can best be presented by unfolding the facts and the law together.

Andrew J. Berryhill was the son of George Franklin Berryhill, a member of the Creek Nation of the mixed blood, and Clementine

Berryhill, his wife, a non-citizen of that tribe. He was born on the 6th day of May, 1901, and died in the month of November of that year, leaving no brothers or sisters surviving him. At no time during his life was he entitled to enrollment as a member of the tribe, or to an allotment of its property. After his death, by the supplemental agreement entered into between the Commission to the Five Civilized Tribes and commissioners of the Creek Nation, proclaimed by the President August 8, 1902, it was provided in Section 7 as follows: "All children born to those citizens who are entitled to enrollment under previous acts, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said commission." Andrew J. Berryhill met precisely the conditions of this agreement. He died, however, before the agreement was entered into, as already stated. But the agreement further made express provision for such a contingency in Section 7, as follows: "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands, and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs, as herein provided, and be allotted and distributed to them." The phrase, "as herein provided," refers to Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, which deals with the subject of heirship and descent.

The word "descend" is, of course, inapplicable to the actual contingency provided for by the statute, because that contingency contemplates the death of the child before he had actually become seized of any interest in the land. The word "descend" is a word of art, and indicates the transference of property by inheritance. If any significance is to be given to it as used in this section, it must be held that the intent of the parties to the agreement was that the land should pass to the same persons and in the same proportions as it would have passed if the child had died seized of it. Any other construction simply obliterates this word, and makes the land pass to the parties who are heirs directly by allotment from the tribe. The statute itself not only declares that it shall "descend," but also declares that it shall be "allotted and distributed" to the heirs. It is manifest, therefore, that both ideas were in the minds of the parties to the agreement.

This construction receives further support by the general scheme which the federal government and the Creek Nation formed for the disposition of the tribal property. The first requisite for the partition of the tribal estate in severalty among its members was to ascertain and legally establish who were members of the tribe. By reason of the many intermarriages between members of the tribe and members of the white and negro races, and by reason of the fraudulent claims to membership, the ascertainment of the particular persons who were in fact entitled to such membership proved a much more difficult task than was at first anticipated. The Commission was empowered and directed to prepare such a roll. This work not only required much investigation on its part, but resulted in voluminous litigation. Instead of being a work of

months it proved to be a work of years. In the meantime, however, the membership of the tribe was constantly undergoing change by birth and death. In order to provide for all members of the tribe who were born subsequent to the beginning of the enrollment, the date of right to enrollment was twice set forward, the statute last quoted fixing the latest date. By reason of these facts when the roll was completed, it contained more names than there were members in being. The roll, however, furnished the basis for the division of the tribal estate. Every person whose name was entered on the roll, was entitled to an equal proportion of the tribal land and funds, but by reason of the fact that before actual distribution could be made, and even while the enrollment was in progress, some persons whose names were on the roll would die, the statute made provision for the disposition of the share of tribal property which would go to them if living. Such a provision was necessary. Otherwise there would have been a portion of the tribal property undisturbed. It was never the intent, however, either of the tribe or of the federal government, to grant to parties having a kinsman who had died before the actual making of the allotment, additional lands as a bounty. These kinsmen got all their right to additional lands under and through the enrolled member who had died. Whether the ancestor was actually seized of the property or not in his lifetime, was immaterial. It was the intent of the statute that the property should pass by the same right and in the same manner that it would have passed if the person enrolled had survived to receive his allotment. The tribe was not bestowing such land as a bounty, but was simply providing for the right of inheritance.

Congress itself has construed this statute. Section 5 of the Act of April 26, 1906, provides: "That all patents or deeds to allottees in any of the five civilized tribes to be hereafter issued, shall issue in the name of the allottee; and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs; and in case any allottee shall die after the restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life; and all patents heretofore issued where the allottee died before the same became effective, shall be given like effect." Here is an express declaration by congress that the land shall descend to heirs the same as it would have descended if the patent or deed had issued to the allottee during his life, and it is declared that allotments for allottees who have died shall also thus descend. This interpretation by congress of its own act leaves no room for doubt as to its intent.

We must, therefore, look to Chapter 49 of the Arkansas statute both to ascertain who the heirs are, and what estate they shall take in the property. That statute does not treat of the subject of heirship independently, but combines that subject with the estate to pass by inheritance. Sub-section 2, of Section 2522, provides as to the general estate, both personal and real, of a person dying intestate, and having no children, that it shall go to the father. This section, however, is to be read in connection with Section 2531, which deals

with the subject of the devolution of property when there is no heir of the blood to whom it can descend. Under this statute, if the deceased person came by the estate from his father, it is to go to the father, and if he came by it from his mother, it goes to the mother. The statute then proceeds: "But if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act." This statute makes provision for all possible acquisitions of real property for the civilized white community whose estates it was intended to govern. Among the people of Arkansas there was no way of acquiring land except by grant, gift or inheritance. This was true even of lands acquired from the federal government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a moment's thought to see that when this statute was applied to the lands of the Creek Nation, it was applied to a subject matter entirely different from that which was in the mind of the legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the nation. They constituted the home or seat of the tribe. Every member by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property. It was granted to the tribe by the federal government not only as the home of the tribe, but as a home for each of the members. From the time they took up their residence west of the Mississippi, the constitutions of the five nations provided that their land should remain "common property; but the improvements made thereon, and in the possession of the citizens of the nation, are the exclusive and indefeasible property of the citizens respectively who made, or may rightfully be in possession of, them." The term "improvements" as here used, meant not only betterments, but occupancy. *Cherokee Nation* v. *Journeycake*, 155 U. S. 196, 210. These "improvements" passed from father to son, and were the subject of sale with the single restriction that they should not be sold to the United States, individual states, or to individual citizens thereof. Under such regulations the members of the Creek Nation had been in possession of homes on their tribal lands for more than half a century. The portion of their lands which were not occupied in severalty, as well as the tribal funds, were treated as belonging to the members, and all income derived therefrom was distributed among them per capita. While the legal title to the tribal property belonged to the tribe as a political society, the beneficial use of the same had at all times belonged to the members in severalty. It was to such a condition of life and property as this that the plan of allotment here involved was to be applied. Its controlling principle is a clear recognition that each

member of the tribe by virtue of his membership, was entitled to an equal share in all the tribal property. To carry out the scheme the law first proceeds on the one hand to ascertain the membership of the tribe, and on the other the actual present value of its property, and then directs that the tribal property be divided per capita so that each member shall receive an equal share thereof, according to its true value. The right to such a share is not created by the statutes, but is simply recognized and enforced by them. The several agreements and acts of congress are not concerned with the legal title, but go back to the actual beneficial rights of property as they had always existed in Indian Territory. They require allotments to be made so as to save to each member his improvements, including his right of occupancy. While the tribe in carrying out the project grants the legal title to the property, it does not confer the right to that property. The act by which the distribution is made is spoken of not as a grant, but as an allotment. We are not departing from the well established doctrine of the Supreme Court that the lands of these Indians belong to them as a political society and not to the individual members. (Cherokee Trust Funds, 117 U. S. 288, 308; *Delaware Indians* v. *Cherokee Indians,* 193 U. S. 127). So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the property antedates the allotment, and is simply given effect to by that act. Viewing the tribal property and its division in this light, Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent and not by purchase. In applying the Arkansas statute we shall accomplish the purpose of congress and the Creek Nation best by treating the lands not as a new acquisition by him, but as an inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right, and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally. From this premise it necessarily follows that George Franklin Berryhill succeeded to the entire estate of the property in question.

We next pass to the rights of the parties to this controversy under the conveyances from George Franklin Berryhill. On June 5, 1906, he and his wife executed a warranty deed of the property to Edmund and Perry McKay in consideration of the sum of $2,000. It is now contended that this deed was void because at the time of its execution the grantor was without legal capacity to make such a conveyance. It is conceded that George Franklin Berryhill had only such power to dispose of the lands in question as was granted to him by act of congress. Both parties base their right upon Section 22 of the act

approved April 26, 1906, which reads as follows: "That the adult heirs of any deceased Indian of either of the five civilized tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe, * * * may sell and convey the lands inherited from such decedent." George Franklin Berryhill and appellant Shulthis, make the same argument upon this statute that they did upon Section 7 above quoted. It is urged that the land in question is not "inherited" land. For reasons already explained, that contention, while technically right, is substantially wrong. The scheme of the statute clearly indicates that the land was to be regarded the same as if it had been inherited. No sound reason can be adduced for treating these lands otherwise than they would have been treated if Andrew J. Berryhill had survived long enough to receive the allotment. This interpretation is further supported by the provision of the several acts dealing with these allotments. Every member of the tribe was allotted a share in the tribal lands. Such allotment is repeatedly spoken of in the act as his homestead. It was intended to be such, and to serve as a sure basis for his own support and the support of his family, either actual or prospective. To protect this homestead it was made inalienable for the term of five years. The reasons for making it inalienable did not apply to lands obtained by inheritance, and for that reason the statute last quoted was passed granting power to convey the same. The lands here in question fall under the same policy as lands obtained by inheritance, and the statute should be held to apply thereto. Berryhill, therefore, had power to make the deed to the McKays.

The remaining question relates to the priority of the conflicting claims of appellant, Shulthis, and the appellees who have succeeded to the rights of the McKays. March 24, 1906, George Franklin Berryhill, under the power granted by Section 17 of the Act of Congress approved June 30, 1902 (32 Statutes at Large, 504), and the rules of the land department made pursuant thereto, executed to appellant, Shulthis, what is known as a departmental lease, granting to him the right to explore for and extract oil and gas from the land in question, for the period of 15 years. This lease, at the time it was executed, required for its completion the approval of the secretary of the interior. Pursuant to rules on the subject it was executed in quadruplicate, one part to be sent to the secretary of the interior, another to be filed in the office of the Indian Agent at Union Agency, Muskogee, and the other two parts to be retained by the lessor and lessee. One month later, to-wit, April 26, 1906, the act was passed which empowered Berryhill to sell and convey the land absolutely without the approval of the secretary of the interior (Sec. 22, 34 Stat. at Large, page 145). June 5th following, Berryhill and his wife, in consideration of the sum of $2,000., executed and delivered the warranty deed to the McKays. The lease to Shulthis was approved by the secretary of the interior about a year later, namely, April 21, 1907. It will be seen that the deed was given about a month after the lease. Was it subject to the lease? The lease was not recorded, and to answer this question we must first inquire whether it was subject to the registration law then in force in Indian Territory; for if it

was not subject to that law, its priority in time would give it priority of right over the deed. By act of February 19, 1903 (32 Stat. at Large, 841), Congress extended the registration law of Arkansas, being Chapter 27 of Mansfield's Digest, to the Indian Territory, and divided the territory into registration districts. It imposed upon the clerk or deputy clerk of court of those districts the duty to record in books provided for that purpose, "all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale, and other instruments of writing of, or concerning lands, tenements, goods or chattels." Section 671 of Mansfield's Digest also provides as follows: "No deed, bond or instrument in writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, shall be good or valid against a subsequent purchaser of said real estate for a valuable consideration, without actual notice thereof, * * * unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated." Did the lease come within the class of instruments specified in these statutes? Was it an instrument by which the title of real estate "may be affected in law or equity"? We think it was. While it required the approval of the secretary of the interior before it became in all respects binding, that approval was intended solely to protect the Indian against improvidence. When the lease was executed and delivered, it created an inchoate interest in the land which by the approval of the secretary became absolute without any further act of the parties. Even after the approval, there would have been nothing to record but the lease. By the doctrine of relation, the leasehold estate upon the approval of the lease, had its beginning at the date of the execution and delivery of the instrument. Either the lease created an equitable interest in the property in favor of the lessee, at the time it was executed and delivered, or the lessee had no interest whatever in the property until the lease was approved. But if we should accept the latter alternative, the lease would be subsequent to the deed and in all respects subordinate to it regardless of the registration law. A question almost identical with the one we are considering was before the Supreme Court in the case of *Lomax* v. *Pickering*, 173 U. S., 26. That involved a deed by an Indian which by act of congress, as well as the patent conveying the land to the Indian, was subject to the following restriction: "But never to be leased or conveyed by him, them, his or their heirs, to any person whatever, without the permission of the President of the United States." The land was situated in Illinois. The registration law of that state was by no means as comprehensive as the statutes above quoted; yet the Supreme Court of Illinois held that the deed upon its execution and delivery, and before it was approved by the President, was an instrument so affecting the title to real property as to require its registration. Speaking of this ruling, the federal Supreme Court used the following language: "Even if this be not a construction of the state statute binding upon us, and decisive of the case, we regard it as a correct exposition of the law." This decision, in our judgment, controls the question we are now

considering, and under it the lease was subject to the registration law in force in the territory, and should have been recorded in order to protect the interest which it granted as against a good faith purchaser. This is not a case in which the title to land is in the government and a proceeding is pending before the land department for its acquisition under the public land laws. The title to the land here was in Berryhill, and the object of the supervisory approval of the secretary of the interior was simply to protect the Indian against the improvident disposition of his property. *Pickering* v. *Lomax*, 145 U. S. 310, 316. We can attach no weight to the suggestion of counsel that Shulthis could not record his lease, because under the rules of the department one copy was to be delivered to, and retained by, him. The lease under such circumstances occupied precisely the same position as a deed. He could have filed it in the proper office for record, and upon its being recorded it would have been returned to him as the muniment of his right.

This leaves only the question whether appellants acquired their title with actual or implied notice of the lease. It is first urged that we should hold that they had implied notice, by reason of the fact that a copy of the lease was, pursuant to the rules of the secretary of the interior, filed with the Indian Agent at Union Agency, Muskogee. That filing, however, was purely for administrative purposes to aid the land department in supervising the leasing of these Indian lands. There was no rule or statute which made such filing notice to parties acquiring an interest in the property. Neither had such parties any right, as a matter of law, to examine the records at the Indian Agency, or to take copies thereof. The evidence itself shows that people dealing in oil and gas leases were accustomed to consult the agency records, and that if inquiry was made there as to whether a given Indian had executed a lease of his property, the clerks in charge of the records would give such information as the records contained on the subject. This information, however, was given as a matter of courtesy, and not pursuant to any legal duty. Congress had already provided carefully for an official record of all instruments in any way affecting the title to real property, and had directed intending purchasers to that record for information. We cannot believe, therefore, that the rule of the secretary of the interior requiring a copy of such leases to be filed with the Indian Agent could create another official record to which intending purchasers were bound to resort at their peril. That record could become notice to a purchaser only by proof that he actually consulted it and learned its contents before acquiring his interest in the property. The evidence affirmatively shows that the McKays knew nothing of the practice of filing leases at the Indian Agency, and made no investigation there. They are therefore unaffected by that record.

Did the McKays have actual notice of the lease. The evidence as to the facts known to them on this subject and the inferences properly deducible from such facts, are in direct conflict. Berryhill testified that the lease to Shulthis was obtained by two parties by the name of McElwane and Chaney, and that he himself did

not know that the lease was in favor of Shulthis, but supposed it ran to McElwane. There was either some actual or supposed defect in the lease, and Chaney came repeatedly to the Indian urging him to execute new papers, which he refused to do. From this experience he came to believe that the lease was void. During the negotiations between him and the McKays for the sale of the land, they inquired of him whether there was anything against the property. His testimony as to what then took place is as follows:

"Q. Just go ahead and tell what you told them at the time you had this trade?

"A. Well, I didn't tell a great deal about it; I told them they had a oil and gas lease on it, and at the time I didn't believe it was any good, and I believe that was all.

"Q. Did you tell them why you didn't believe it was any good?

"A. Yes sir.

"Q. Why did you tell them?

"A. Because they come back and wanted me to change my woman's name, and we didn't do it.

"Q. Did you tell them who took that lease?

"A. Told them who had it.

"Q. Who did you tell them?

"A. McElwane and Chaney."

Both of the McKays testified as witnesses in the case. The substance of their evidence is that in response to their inquiry as to whether there was anything against the land, he at first said there was nothing, but afterwards stated that he had signed an old lease some time ago, but it was not any good; he said he knew because the parties for whom he had signed this lease had come back after him and wanted him to sign up new papers, and when asked the names of the parties to whom he had given the papers, he answered that he didn't know. This is the testimony of one of the McKays, and the other stated in substance as follows: "We asked him if he had ever made any deal on his land or signed any papers of any kind against the land. He first said he had not signed any papers, and then he said afterwards that he did sign some kind of papers, but he didn't know who they was to, or what they meant, and they came back to him and wanted him to sign them over again, and he would not do this. He didn't know the name of the parties to whom he had made the papers. I remember of asking him who he had signed papers with, and he said he didn't know. It appears from Berryhill's evidence that he did not know McElwane, the party to whom he supposed the lease ran, but did know Chaney. Upon receiving the above information the McKays paid a small part of the consideration, and declined to pay the balance until they had obtained an abstract of title to the property. This they immediately did, and the abstract showed the title to be clear. They then went forward and paid the balance of the consideration. This evidence makes a close case on the question of notice. If Berryhill in fact told the McKays the name of the parties to whom he had executed the papers, they of course could not have accepted his statement that the papers were invalid, but would have been

charged with the duty of consulting the other parties to the transaction, and ascertaining from them the nature and extent of their rights. Failure to do so would have impressed the land in their hands with all the rights of those parties. The question of notice, therefore, turns upon whether the preponderance of the evidence shows that the McKays knew or could by the exercise of reasonable care have ascertained the name of the parties holding these outstanding rights. The testimony of the McKays on this point is directly in conflict with that of Berryhill. They state that they inquired of him directly the names of the parties to whom he had executed these papers, and that he told them that he did not know who they were. We accept their testimony as the more credible on this question for the following reasons: First, witness for witness, they are certainly as trustworthy as Berryhill. Second, Berryhill at the time was anxious to consummate the sale of the land to them. He thus had a strong motive to conceal from them any knowledge which would be likely to defeat that purpose. His native shrewdness would teach him that if he disclosed the name of Chaney, the McKays would consult him, and thus ascertain the state of the title and decline to consummate the purchase. Third, the McKays were farmers. There is no evidence in the record that they purchased the land for oil and gas purposes, or for any other purpose than agriculture. They had never themselves had anything to do with oil and gas leases, and for that reason knew nothing about the filing of such leases with the Indian Agent, or that it was possible to learn from that source what leases an Indian had given. Fourth, the evidence contains convincing proof that they did not shut their eyes against ascertaining the existence of the outstanding rights referred to by Berryhill, in order that they might not learn the truth. On the contrary, they took the very steps which would have been taken by a prudent business man to ascertain the state of the title. Instead of consummating the purchase, they suspended the transaction, and ordered an abstract. They had good reason to believe that if there was any outstanding instrument affecting the title to the property, the records would disclose that fact. The abstract showed the title to be clear. This was strong confirmation of what Berryhill had told them that the papers which he had executed were "no good," and were so regarded by the parties to whom they had been given. Upon this showing we are of the opinion that the McKays acted in good faith in accepting the deed and paying the purchase price. They exhausted the sources of information that had been disclosed to them, and what they discovered was such as would have led a man of reasonable prudence to believe that the title to the property was clear. 2 Pomeroy's Equity Jurisprudence, p. 1008, note 1. The mere knowledge that papers had been previously executed which might affect the title to real property, will not necessarily defeat the claim of a good faith purchaser. In Stanley v. Schwalby, 162 U. S. 255, the purchaser employed counsel to examine the title. In the course of his investigation he learned as a fact that the land had been previously sold, but there being no conveyance of record, and the transaction

being an old one, he reached the conclusion that the title of the vendor was good, and so reported to his principal. The Supreme Court, though holding that the principal was charged with all the knowledge possessed by his agent, still decided that the vendee was entitled to the protection of a good faith purchaser. Speaking to this question it said: "In order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or at least of such circumstances as would by the exercise of ordinary diligence and judgment lead to that knowledge; and vague rumor or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance." In the case of United States v. Detroit Lumber Co., 200 U. S. 321, the suspicious circumstances were much stronger than in the present case, but the Supreme Court refused to charge the purchaser with notice, using the following language: "A chancellor will not be astute to charge a constructive trust upon one who has acted honestly and paid a full and fair consideration without notice or knowledge. On this point we need only to refer to Sugden on Vendors, page 622, where he says: 'In *Ware v. Lord Egmont*, the Lord Chancellor Cranworth expressed his entire concurrence in what, on many occasions of late years, had fallen from judges of great eminence on the subject of constructive notice, namely, that it was highly inexpedient for courts of equity to extend the doctrine. When a person has not actual notice, he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired, but also that he ought to have acquired it, but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether he had the means of obtaining and might by prudent caution have obtained the knowledge in question, but whether not obtaining it was an act of gross or culpable negligence.'" See also the same case in this court, 131 Fed. 668, 674.

The position of the assignees of the McKays, however, is more favorable than their own. The evidence shows affirmatively that in October, 1906, the McKays executed an oil and gas lease of the property to Arthur B. Reese, under whom the other defendants claim. The rule is well settled that if Reese took without notice of plaintiff's lease, his title would be good though his vendor had such notice. *Stanley v. Schwalby*, 162 U. S. 255-283. At the time Reese accepted his lease, he inquired of the McKays whether there was any outstanding claim against the property, and was told by them that there was not. In proof of their statement they exhibited to him the abstract of title showing the land to be clear. Reese also caused inquiry to be made of the Indian Agency as to whether any oil and gas leases appeared of record there, and received a certificate from an abstracter who made the inquiry on his behalf, that no such lease had been filed. Reese had no actual knowledge of any fact or circumstance which put him upon inquiry as to the

existence of any prior lease or claim. Complainant seeks to charge him with notice because he in fact made inquiry at the Indian Agency where the lease was filed, but failed to discover its existence. It is charged that his investigation there was negligent, and that he is therefore impressed with notice of all that he would have discovered if he had made proper inquiry. The answer to such a claim is this: Reese was charged with no duty of inquiring at the agency. An ineffectual inquiry, therefore, cannot place him in a worse position than he would have been if he had made no inquiry at all. But again, we think that he is not properly chargeable with negligence. He applied to an abstracter to ascertain from the files of the agency whether any lease appeared there against the property, and received a written statement from him that no such lease was on file. This surely was the exercise of such care as a reasonable and prudent business man would have exercised under the same circumstances. For reasons which we have already explained, the records at the Indian Agency had no force to impart constructive notice. The evidence is clear that neither Reese nor his agent at the time he took his lease had any actual knowledge of what appeared upon those records. Inasmuch as he was under no legal duty to search at the agency, his ineffectual effort to ascertain the state of its files certainly cannot place him in the same position as he would have occupied if he had obtained actual knowledge of the lease.

From a careful examination of the evidence we are of the opinion that the defendants are entitled to the protection of good faith purchasers as against complainant's lease. The decree, therefore, of the trial court, was right, and it is Affirmed.

Riner, District Judge, concurs in the result.

Filed June 3, 1909.

(*Decree in Cause No.* 2901.)

And on the third day of June, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is a decree in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1909.

THURSDAY, *June* 3, 1909.

No. 2901.

ALBERT W. SHULTHIS, Appellant,

vs.

D. A. MCDOUGAL, EDMOND MCKAY, PERRY MCKAY, THE KIEFER OIL AND GAS COMPANY, and GEORGE FRANKLIN BERRYHILL.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that D. A. McDougal, Edmond McKay, Perry McKay, The Kiefer Oil and Gas Company and George Franklin Berryhill have and recover against Albert W. Shulthis the sum of twenty dollars for their costs herein and have execution therefor.

June 3, 1909.

(Petition of Albert W. Shulthis for a Rehearing in Cause No. 2901.)

And on the twenty-fourth day of July, A. D. 1909, the petition of Albert W. Shulthis for a rehearing was filed in Cause No. 2901, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals in and for the Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al., Appellees.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervenor, Appellant,
vs.
ALBERT W. SHULTHIS et al., Appellees.

Petition of Albert W. Shulthis for Rehearing.

Having carefully examined the opinion of the Honorable Court, we believe that with propriety, we may ask the court to consider whether this case be not one in which it will be proper to grant a rehearing to the appellant, Albert W. Shulthis, on the grounds: First, that the act of congress, approved February 19th, 1903, entitled "An act for the record of deeds and other conveyances, and instruments of writing in Indian Territory, and for other purposes," has no application to mineral (oil and gas) leases, required by law to be made under the rules and regulations of the Secretary of the Interior. Second, that this Honorable Court, by misinterpretation and misapplication of the rules and regulations of the Secretary of the Interior, and the act of Congress pursuant to which such rules and regulations were promulgated, deprived the appellant's oil and gas lease of the priority in effect to which it was entitled.

The court in its opinion sets forth this question: Was the warranty deed from George Franklin Berryhill, to the McKays, executed on June 5th, 1906, subject to the lease executed to the appellant by George Franklin Berryhill on March 24th, 1906? And then says: "The lease was not recorded, and to answer this question we

must first inquire whether it was subject to the registration law then in force in the Indian Territory; for if it was not subject to that law, its priority in time would give it priority of right over the deed." The legal prnciple here enunciated is undoubtedly well established. However, we respectfully submit that the court by misinterpretation of the rules and regulations of the Secretary, lawfully prescribed for the execution and delivery of oil and gas leases on restricted lands, and of the act of Congress pursuant to which the rules and regulations were promulgated, has deprived the appellant's lease of the priority, to which, by the principle of law set forth by the court, it is entitled.

The act of Congress, approved June 30, 1902, (32 Stat. L., 500), entitled "An act to ratify and confirm a supplemental agreement with the Creek Tribe of Indians and for other purposes," and which is known as the "Supplemental Creek Agreement," provides:

"SECTION 17. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

" 'Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.' "

The first rules and regulations of the Secretary of the Interior, promulgated pursuant to the authority granted by this section bore date of January 21st, 1903, about a month prior to the passage of the "Recording Act" above referred to. These rules and regulations with but few changes, were in full force and effect on March 24th, 1906, the date of this appellant's lease. On this latter date no Indian member of the Creek Nation could sell, nor could he lease any of his lands for oil and gas purposes, except with the approval of the Secretary of the Interior; and all oil and gas leases on Indian lands at that date must have been executed in exact accordance with the rules and regulations of the Secretary of the Interior—otherwise they would have been absolutely void and not susceptible of ratification in any manner.

It is well settled that the courts will take judicial notice of the contents of the rules and regulations made by the head of an executive department of the government, pursuant to authority granted by act of Congress.

Caha vs. United States, 158 U. S., 222.

United States vs. Bailey, 9 Peters, (U. S.) 253.

We attach to this petition a full copy of the rules and regulations of the Secretary of the Interior, in force March 24th, 1906, relative

to the leasing and sale of restricted lands in the Creek Nation. The rules and regulations by which both appellant Shulthis and his lessor were bound, provide:

"SECTION 5. No lease will be approved for a greater term of years than as follows: Three years for grazing purposes, ten years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the Agent, Union Agency, one to be delivered to the lessee, and one to the lessor.

"SECTION 16. * * * All leases which require the approval of the Secretary of the Interior must be submitted to the Indian Agent, Union Agency, for transmittal within 30 days from and after the date of the execution of the lease, and all such leases which have been heretofore executed must be submitted to said Agent within 30 days from the date of approval of this amendment. No such lease presented after the time herein designated will be received by the agent or transmitted to the Department or regarded as having any effect whatever."

The act of Congress approved February 19th, 1903 (32 Stat. L. 841) which we designate the "Recording Act" entitled "An act providing for the record of deeds and other conveyances and instruments of writing in Indian Territory and for other purposes," (passed and approved after the rules and regulations above noted were issued) provides:

"That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, so far as the same may be applicable and not inconsistent with any law of Congress * * *"

By extending the law only so far as applicable and consistent with prior legislation, all idea of a repeal or limitation of the powers of the Secretary of the Interior is eliminated. The powers of the Secretary with reference to oil and gas leases on restricted lands were absolutely the same after February 19th, 1903, as they were prior thereto. This proposition is undoubtedly sound, and cannot be seriously controverted. The position then, which we take, and to which we ask this Honorable Court to subscribe is, that the sections of the Statutes of Arkansas referred to, are inconsistent with the above quoted section 17 of the "Supplemental Creek Agreement," and that the authority therein granted to the Secretary of the Interior to make all advisable rules and regulations in respect to mineral leases, *are* inapplicable to Departmental oil and gas leases.

The rules and regulations provide that all oil and gas leases be executed in quadruplicate. This Honorable Court in its opinion says:

"Pursuant to rules on the subject it (appellant's lease) was executed in quadruplicate, one part to be sent to the Secretary of the Interior, another to be filed in the office of the Indian Agent at Union Agency, Muskogee, and the other two parts to be retained by the lessor and lessee.

And further:

"We can attach no weight to the suggestion of counsel that Shulthis could not record his lease, because under the rules of the department one copy was to be delivered to and retained by him. The lease under such circumstances occupied precisely the same position as a deed. He could have filed it in the proper office for record and upon its being recorded it would have been returned to him as the muniment of his right."

Here we respectfully submit that the court was led into error by its misinterpretation of section 5 and section 16 above quoted. One part of the lease was not retained by the lessee, prior to the approval of the lease, nor was one part retained by the lessor; but under the provisions of the above quoted section 16 of the rules and regulations, all four parts of the lease were filed in the office of the Indian Agent, at Union Agency for transmittal by him to the Secretary of the Interior:—for approval, if there had been an entire and full compliance with all necessary requirements,—for disapproval, if not.

Further, under the provisions of said section 16, all four parts of the lease must have been filed with the Indian Agent prior to the lapse of 30 days from the date of execution of the lease. Had the lessee not filed all four parts of the lease within 30 days, the lease would not even *had* been received by the Secretary of the Interior for consideration. This is the uniform and settled construction given at all times to sections 5 and 16 by the Department and the Secretary of the Interior. The lessee retained no part of the lease, and had nothing to record until after the approval of the lease, and until after the delivery to him of the approved quadruplicate part. The appellant's part of the lease is shown by Exhibit "A" to the bill of complaint (Printed Transcript, p. 20) and the agreed statement of facts (Printed Transcript, p. 203) admits that the lease and all the endorsements thereon are correct. It is further admitted that the lessee's part of the lease (the quadruplicate) with the other three parts, were filed in the office of the Indian Agent, at Union Agency, Muskogee, on April 21, 1906, within the 30 day limit prescribed by the rules and regulations; that all four parts of the lease were approved by the Secretary of the Interior, April 19th, 1907; that thereafter, one part was retained on file in the office of the Commissioner of Indian Affairs; the duplicate part retained on file in the office of the Indian Agent, at Union Agency; the triplicate part delivered to the lessor, and the quadruplicate part delivered to the lessee, Albert W. Shulthis. Then for the first time did the appellant have an opportunity to record his lease; and the records show (Printed Transcript p. 203), that he immediately on, to-wit: May 18th, 1907, filed the lease for record in the proper recording district; not by virtue of the provisions of the "Recording Act" of February 19th, 1903, but in accordance with the provisions of Section 20 of the act of Congress approved April 26th, 1906, which are as follows (34 Stat. L., 137):

"SECTION 20. That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-blood allottees of the Choctaw, Chickasaw, Cherokee, Creek

and Seminole tribes, shall be in writing and subject to the approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval: Provided, That allotments of minors and incompetents may be rented and leased under order of the proper court: Provided, further, That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory."

The concluding sentence of this section is an express legislative declaration that the recording laws had no prior application to leases on restricted lands, *i. e.*, Departmental leases.

We submit that it would be absolutely impossible for the appellant to have protected himself, if the recording laws put in force in Indian Territory on February 19th, 1903, be held applicable to Departmental leases. In other words, it would have been utterly impossible for the lessee, Shulthis, to have complied both with the provisions of the "Supplemental Creek Agreement" and the rules and regulations of the Secretary of the Interior on the one hand, and the provisions of the Arkansas recording laws on the other. This being so, the conclusion is irresistible that the recording laws of Arkansas, spread over the Indian Territory, by the act of February 19th, 1903, "so far as applicable," have no application to appellant's departmental lease; that therefore, the lease being prior in point of time to the deed under which the appellees, Keifer Oil & Gas Company, and the two McKays claim, is prior in effect.

We do not contend that the records in the Indian Agency afforded "constructive notice" in the sense in which that term is used in the registry acts; but we would submit that under the recent decision of this court in the case of *Martin vs. United States*, 168 Fed Rep., 198, the office of the Indian Agent is a public office, and the documents therein contained are public documents; and that not the slightest distinction can be made between the documents in the office of the Commissioner from those in the office of the Indian Agent for the Five Civilized Tribes. Under this decision it was not a courtesy on the part of the officer in charge of the records, but it was a right on the part of any interested person, to demand an inspection and to be accorded it.

The act of the Secretary of the Interior in approving a lease was not administrative, but was quasi-judicial. Too frequently leases covering the same land, from the same lessor and to different lessees, were executed, delivered and filed in the Indian Agency. The Secretary in such case might approve which lease he chose. He could, and often did approve a junior lease, with resultant disapproval of the prior ones. He could refuse his approval for fraud, duress or gross inadequacy of consideration. Great care was needed and was given to guard against injustice; a slight irregularity, an erasure or interlineation, unexplained, might bring disapproval; we believe that had the lessee attempted unjustly to bind the title of his lessor by recording a copy of his lease prior to its presentation for approval, the lease bearing the recorder's stamp would have been disapproved. That this belief was general is evidenced by the absence of the Recorder's

stamp on the leases now on file and a part of the records in the office of the Indian Agent at Union Agency.

It cannot be contended that the "Recording Act" in anywise repealed or limited the power or authority of the Secretary of the Interior, granted by section 16 of the "Supplemental Creek Agreement," to approve oil and gas leases, and provide all advisable rules and regulations with reference thereto.

Now, assume for the moment that there was incorporated in the oil and gas regulations, a rule in substance as follows:

That no lease recorded prior to the filing of the same in the office of the Indian Agent, at Union Agency, will be received by the Agent for transmittal to the Department, or regarded as having any effect whatever.

The Secretary of the Interior had full power to make such a rule, and we would suggest that such a rule would have been salutary as effectually preventing the clouding of the lessor's title, in case the lease was subsequently disapproved.

In truth and in fact this rule was virtually in operation by reason of the fact that the lease form prescribed by the Secretary of the Interior, as shown at page 42 of the attached rules, contained no formal acknowledgment so as to entitle the lease to record, and it was by sufferance that the acknowledgment was attached, in order that the lessee might file his lease for record after its approval.

Not until after the passage of the act of April 26th, 1906, providing for the recording of all leases, did all oil and gas lease forms prescribed by the Secretary of the Interior contain a form of acknowledgment, so that all lessees might comply with the provisions of section 20 (above quoted) of that act.

Again, assume, if the court please, that section 16 (above quoted) provided that all leases must be submitted and filed with the Indian Agent, within *three* days of the date of the execution thereof, instead of *thirty* days. This would absolutely be within the power of the Secretary of the Interior, and would destroy the one remote chance of the lessee to comply with both the rules and regulations and the recording laws.

Further, to make the situation impossible, suppose the regulations prescribed that all leases be executed in the presence of the Indian Agent, and retained by him in his office until transmitted to the secretary for approval. This rule would have been perfectly proper.

Now, if it lay within the power of the Secretary of the Interior by virtue of the authority granted him by section 17 of the "Supplemental Creek Agreement" approved June 30, 1902, (32 Stat. L., 500) to render it utterly impossible for a departmental oil and gas lessee to comply with the "Recording Act" put in force by the act of February 19th, 1903, then certainly it must follow that the "Recording Act" had no application to departmental leases. We need not inquire as to the exercise of the power,—the existence only is sufficient. To day a lessee might have ample opportunity to record his lease before filing the same for approval,—to-morrow, by a change of rules he might be utterly deprived of that opportunity. The ex-

istence of this power in the secretary rendered the recording laws absolutely inapplicable; and to hold that the recording laws were applicable, in the absence of the exercise of that power, would be holding that the Secretary by rule or regulation could repeal a prior act of Congress.

The case of *Lomax vs. Pickering*, 173 U. S., 26, cited by this Honorable Court in its opinion has, we submit, no bearing on the case at bar. The Supreme Court in that case held only that a warranty deed, regular in form, and complying with the conveyancing laws, was entitled to record. This is undoubtedly correct. So, too, a recording office in the Indian Territory could not have refused to receive for record, leases or deeds on restricted lands, if such leases or deeds in all respects complied with the Arkansas conveyancing and the recording laws. Even though such lease or deed might be absolutely void by reason of the incapacity of the grantor or lessor. The lease of the appellant, Shulthis, however, shows on its face by express words that it was made under the provisions of section 17 of the act of Congress approved June 30, 1902; that it was made subject to the rules and regulations of the Secretary of the Interior, and that the force and effect of the lease was held in abeyance until approved by the Secretary of the Interior. The recorder might record such lease if presented, but under the decision in *Lomax vs. Pickering*, the record thereof would avail nothing and would not be notice to a bona fide purchaser.

The only conclusion in this case which can be drawn from the decision of the Supreme Court in the case of *Lomax vs. Pickering* is that the effect of the deed from George Franklin Berryhill to the McKays, and the subsequent lease of the McKays to Reese, are bound to be the same, irrespective of whether the prior lease from Berryhill to appellant, Shulthis, was recorded or not.

This appellant at the time of the execution of the lease to him by George Franklin Berryhill took the only course that was open to him. He could not anticipate that within two months subsequent legislation by Congress might relieve the lands covered by his lease from all restrictions on alienation. He had, we submit, a right to rely on the laws existing at the time of the execution of his lease, and relying on those laws, and complying with them, he should not, and could not be stripped or deprived of his rights by subsequent legislation.

Wherefore, upon the foregoing grounds, this appellant and petitioner respectfully prays this Honorable Court to grant him a rehearing herein.

C. L. THOMAS,
EDGAR A. DE MEULES,
Solicitors for Albert W. Shulthis

We, C. L. Thomas and Edgar A. De Meules, counsel for appellant herein, Albert W. Shulthis, do hereby certify that in our judgment, the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

C. L. THOMAS.
EDGAR A. DE MEULES.

Revised regulations (March 20, 1905, with amendments) governing the sale and leasing of lands in the Creek Nation, Indian Territory, prescribed by the Secretary of the Interior for the purpose of carrying into effect the provisions of sections 16 and 17 of the act of Congress approved June 30, 1902 (32 Stat., 500), and ratified by the Muskogee (or Creek) National Council on July 26, 1902.

Washington: Government Printing Office, 1906.

Regulations.

The following regulations are hereby prescribed for the purpose of carrying into effect the provisions of sections 16 and 17 of the act of Congress approved June 30, 1902 (32 Stat., 500), and ratified by the Muskogee (or Creek) National Council on July 26, 1902, which said sections are as follows:

16. Lands allotted to citizens shall not in any manner whatever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment 40 acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable, inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

Selections of homesteads for minors, prisoners, convicts, incompetents, and aged and infirm persons, who cannot select for themselves, may be made in the manner provided for the selection of their allotments, and if for any reason such selection be not made for any citizen it shall be the duty of said Commission to make selection for him. The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after May 25, 1901, but if he have no such issue then he may dispose of his homestead by will, free from the limitation herein imposed, and if this be not done the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein otherwise prescribed. Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

17. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is reenacted to read as follows:

"Creek citizens may rent their allotments, for strictly nonmineral purposes, for a term not to exceed one year for grazing purposes only and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes

and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. Cattle grazed upon leased allotments shall not be liable to any tribal tax, but when cattle are introduced into the Creek Nation and grazed on lands not selected for allotment by citizens, the Secretary of the Interior shall collect from the owners thereof a reasonable grazing tax for the benefit of the tribe, and section 2117 of the Revised Statutes of the United States shall not hereafter apply to Creek lands."

Deeds (See also Page 10).

SECTION 1. Creek citizens desiring to sell such of their lands as they are authorized to sell by the act of June 30, 1902 (32 Stat., 500), with the approval of the Secretary of the Interior, may apply to the Indian agent or other officer in charge of the Union Agency, Muskogee, Indian Territory, by petition, in duplicate, containing an accurate description of the land and improvements thereon, praying that such land may be sold in accordance with these regulations, and agreeing that the proceeds to be derived therefrom shall be placed with the most convenient United States depository to their credit, subject to their check, or, in cases of minors and incompetents, subject to the check of their legal guardian, for amounts not exceeding fifty dollars to each in any one month, when approved by the agent or other officer in charge, and only when so approved, and if same is in excess of fifty dollars per month, upon the approval of such agent only when specifically authorized by the Commissioner of Indian Affairs. The petition shall be signed by all persons having any interest in the land, and, in cases of minors and incompetents, by their legal guardians, and shall set forth every material fact necessary to show full title to the land, and why it would be for the best interest of the owner to sell it. Any regulation heretofore made inconsistent herewith is hereby rescinded.

SEC. 2. Creek citizens desiring to sell such of their lands as they are by law authorized to sell with the approval of the Secretary of the Interior, may apply to the Indian agent or other officer in charge at the Union Agency, Muskogee, Indian Territory, by petition, in duplicate, containing an accurate description of the land and improvements thereon, praying that such land may be sold in accordance with these regulations, stating facts to show title and why it will be for the best interest of the owner to sell it for a fair price, and signed by all persons or their legal representatives having any interest in the land. A form of petition has been prescribed which must be used.

(1) When such Indian agent or other officer in charge shall be satisfied that the facts alleged in the petition are sufficient, he shall cause a memorandum record of the same to be made in a book to be kept for that purpose, and shall file the petition in his office. The

duplicate copy of such petition shall be immediately forwarded to the Commissioner of Indian Affairs by such agent or other officer in charge, who, before so forwarding it, shall endorse thereon the date the same was received by him and the date the land described therein will be listed for sale.

(2) Such agent or other officer in charge shall on each Monday morning post in a conspicuous place in his office, in such large letters and figures as shall be clearly legible, for a period of sixty days, a list of the lands described in petitions received by him during the week preceding such Monday, showing in separate columns the names of the owners, the description of the lands, the dates when listed, and the dates when the bids will be opened, and such list shall be accessible to the public at all times in the business hours of the office. On each Monday the Indian agent or other officer in charge will forward to the Commissioner of Indian Affairs a complete list of all lands posted in his office for sale.

(3) When any tract of land has been so listed, the Indian agent or other officer in charge, when competent from his general knowledge of the value of the land, shall visit, view, and appraise the same at its true value, according to his best judgment. If such agent or other officer is not so competent, or if it shall be impracticable for him to personally visit and appraise the land, he shall require the appraisement to be made in like manner by a competent officer or employee under his charge. A certificate of said appraisement, signed and sworn to by the person making it, shall be sealed and not opened until the sealed bids for that tract of land are opened. *The appraisement shall not be made public,* but no bid less than the appraised value shall be considered. If the appraisement is made by other than the agent or officer in charge, such agent or officer in charge shall add his certification of the qualifications and integrity of the appraiser, and that he believes the appraisement to be true value of the land.

(4) Sealed bids will be received by such agent or other officer in charge at his office for any land so listed up to 2 o'clock p. m. of the day on which bids are advertised to be opened, at which hour they will be opened. If a bidder desires to bid on tracts not contiguous he must submit a separate bid for each tract, and if he desires to purchase less than an entire tract offered he may submit a bid for one or more legal subdivisions thereof.

(5) All such bids, before being deposited with the Indian agent or other officer in charge, shall be inclosed in a sealed envelope, upon which must be written "Bid for Creek land," and the date the bid will be opened must be endorsed on the envelope. The envelope must *not* contain a description of the land. Neither the Indian agent nor any official connected with the Indian Service, will be permitted to prepare any bid or assist any prospective bidder in preparing his bid. Bids shall be numbered by such Indian agent or other officer in charge in the order in which the same shall be received by him, and a memorandum record of each, containing number of bid and description of land, shall be kept in a book suitable for that purpose. Each bid must be accompanied by a duly certified

check on some solvent bank, payable to the Commissioner of Indian Affairs, for the use of the grantors, for twenty per cent of the amount offered, as a guarantee for the faithful performance by the bidder of his proposition. If the bid shall be accepted and the successful bidder shall within a reasonable time, not exceeding ten days, after due notice, fail to comply with the terms of his bid, such check shall be forfeited to the use of the owner of the land.

(6) The right to reject any or all bids is reserved, but in all cases the highest bid shall be accepted by such Indian agent or other officer in charge, and such acceptance shall be subject to the approval of the owner of the land.

(7) Purchasers shall, before delivery of deed, pay all costs of conveyancing, and, in addition thereto, to cover the expenses of advertising, the sum of one dollar when the purchase price does not exceed $1,000, one dollar and twenty-five cents when the purchase price exceeds $1,000 and does not exceed $2,000, and one dollar and fifty cents when the purchase price is more than $2,000.

(8) Bidders and other interested persons may be present when bids are opened. When opened the bids shall be so recorded, in a book to be kept for that purpose, as to show the name of the bidder, description of land, amount offered, and action taken thereon.

(9) Listed land not disposed of at the appointed time may, if the owner so desires, be relisted under the same rules as governed its original listing, except in any case where the owner has refused to approve the highest bid, when such bid is deemed by the Indian agent or other officer in charge to be a fair price for the land, and in such case the land may be relisted as aforesaid, in the discretion of the Indian agent or other officer in charge.

(10) When bids are opened the certified checks accompanying each shall, as soon as practicable, be returned to the bidder (except that accompanying the accepted bid) by the Indian agent or other officer in charge, who shall take the bidder's receipt for the same of which he shall in each case make full report to the Commissioner of Indian Affairs without unnecessary delay.

(11) The Commissioner of Indian Affairs shall cause an advertisement of lands listed to be published in at least one weekly newspaper published at Muskogee, Indian Territory, and such additional weekly newspapers as he may deem advisable, so that each tract listed shall, as nearly as may be practicable, be advertised during the listed period.

(12) The advertisement shall contain a description of the land as listed and shall state that sealed bids will be received therefor at the agency until the day when bids are to be opened, which day shall be clearly specified, and that such sealed bids must be accompanied by and contain a duly certified check on some solvent bank, payable to the order of the Commissioner of Indian Affairs, for twenty per cent of the amount of the bid, and that further information and a copy of rules and regulations applicable may be had at the Union Agency.

(13) In addition to such advertisement the Commissioner of Indian Affairs shall cause public notice to be given by publication

in a newspaper published at Muskogee, that rules and regulations and any other information relative to sale of Creek lands may be obtained on application to the Indian agent, Union Agency, Muskogee, Indian Territory, and such publication shall continue until otherwise ordered by the Commissioner of Indian Affairs.

SEC. 3. The deed must be executed in the presence of two subscribing witnesses and duly acknowledged before the Indian agent at Union Agency, a notary public, or other officer duly authorized to take acknowledgments of deeds. The witnesses must make affidavit that the deed was in their presence read and fully explained to the grantor, and that he understood the nature, contents, and effect thereof, and approved and signed the same in their presence.

SEC. 4. Such deed when transmitted by the Indian agent or other officer in charge for the Secretary's approval must be accompanied by the original petition, the certificate of appraisement, all bids relating to the land covered by such deed, a duly certified check on a solvent bank for the full purchase price, payable to the order of the Commissioner of Indian Affairs, and a full report by the Indian agent or other officer in charge of all proceedings previous to the execution of the deed, also—

(1) By the certificate of the Indian agent or officer before whom the deed was acknowledged, that the contents, purport, and effect of the deed were explained to and fully understood by the grantor or grantors; that the consideration specified in the deed is a fair price for the land; that the conveyance is in every respect free from fraud or deception; and that the land described in the deed is no part of the grantor's homestead. The affidavits of the grantor or grantors and the grantee or grantees must accompany such deed, showing that there is no contract, agreement, or understanding (written or verbal) whereby the consideration money or price paid for the land, or any portion thereof, is to be refunded to the purchaser of the deed; nor any live stock, implements, other articles or things are to be exchanged or taken in lieu of said consideration or purchase price, or any portion thereof, for said lands. The deed must also be accompanied by an affidavit of the grantee (or grantees) stating that he (she or they) is not a party to any association or combination of persons to acquire the land described in the deed at less than its fair value, or to prevent open and fair competition in the purchase thereof, and that neither the grantor, nor anyone acting for him in his place, has been given or promised any money or other thing by the grantee, or by anyone with his advice, consent, or knowledge, except the consideration named in the deed, to induce him to agree to such sale of his land.

(2) When the deed has been returned to the Indian agent, duly approved by the Secretary of the Interior, it shall be accompanied by the certified check for the purchase price duly endorsed, with appropriate instructions from the Commissioner of Indian Affairs to the Indian agent relative to the delivery of the deed to the grantee and the payment of the purchase price to the grantor. The Indian agent in reporting on deeds will be careful to show the value of the land, as appraised by the Commission to the Five Civilized Tribes,

in order that the Department may know how it was classified for distribution. He will ascertain whether the party or parties seeking to sell are the parties to whom the land was allotted, and will give his opinion as to whether the instrument shall be approved, with his reasons for such opinion.

Leases (See Also Page 10).

SEC. 5. No lease will be approved for a greater term of years than as follows: Three years for grazing purposes, ten years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, one to be delivered to the lessee, and one to the lessor.

SEC. 6. All leases must accurately describe the lands, specify the rents or royalties and when the same are to be paid, and they must contain a provision to the effect that if the lessee shall fail to pay the rents or royalties or any part thereof when due, or shall fail to faithfully comply with the terms and conditions of the lease, such failure shall constitute a forfeiture of the lease and all improvements placed on the land by the lessee, and that the lessor shall be entitled to immediate possession of the leased lands and the improvements located thereon.

All improvements placed on the lands by the lessee to an agricultural or grazing lease, or anyone holding under him as a sublessee, or otherwise, shall, at the expiration of the lease, be and become the property of the owner of the land.

This regulation is also applicable to all improvements and buildings placed upon lands leased for mineral purposes, except tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, casings of all dry or exhausted wells, and machinery.

All original lessees, except of mineral lands as hereinafter provided, shall be required to furnish a bond executed by two or more sufficient sureties, each of whom must justify under oath to an amount equal to the entire rental, guaranteeing the payment of all rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the indenture to be paid and performed by the lessee. Each mineral lease must be accompanied by an application, under oath by the lessee, upon blanks to be furnished by the agent. Each applicant will be required to state that the application is not made for speculation, but in good faith, and where the lease is for mining purposes, for mining the mineral or minerals specified, including oil and natural gas. A map must accompany each application, therein showing the amount of land of each legal subdivision supposed to be underlaid with mineral, oil, or natural gas, as the case may be, and if mineral other than oil or natural gas, the quantity that can probably be mined. Applicants must furnish such other information as may be desired by the agent regarding their prospective operations. Applications by parties who do not themselves intend to conduct operations on the land will

be rejected. Should the application be approved, bond will then be required as provided for hereinafter.

In all mineral leases it must be provided that only so much of the surface of the land described as may be reasonably necessary to carry on the work contemplated may be occupied by the lessee.

All original lessees of mineral lands shall be required to furnish a bond, with two or more sufficient sureties, or a responsible surety company, guaranteeing the payment of all royalties and rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the lease to be paid and performed by the lessee. Such bond shall be in amount as follows: For leases covering 40 acres and less than 80, $1,000; for those covering 80 acres and less than 120, $1,500; for those covering 120 acres and not more than 160, $2,000, and for each 40-acre tract, or fractional part thereof, above 160 acres, an additional amount of $500; but the right is specifically reserved to increase the amount of such bond above the sums named in any particular case where the Secretary of the Interior deems it proper to do so.

No lease shall be sublet, transferred, or assigned without the consent and approval of the Secretary of the Interior.

All mineral leases shall provide for the payment of advanced annual royalty in sums of not less than 15 cents per acre per annum for the first and second years, 30 cents per acre per annum for the third and fourth years, and 75 cents per acre per annum for the fifth and each succeeding year thereafter, for the term for which the lease is to run, the sums thus paid to be a credit on the stipulated royalties should the same exceed in any one year the amount of the advanced payment.

All oil and gas leases shall provide for the payment of a royalty of 10 per cent of the value on the leased premises of all crude oil extracted from said land, to be paid monthly, on or before the 25th day of the month succeeding that in which it is produced, and the average value of the oil during the month in which it is produced shall constitute the criterion for computing the royalty. The royalty on natural gas shall be fixed by the Secretary of the Interior at the end of each year, or oftener, in his discretion.

All coal and asphalt leases shall provide for the payment of royalties as follows, to-wit: On asphaltum, the sum of 10 cents per ton for each and every ton of crude asphalt produced weighing 2,000 pounds, or the sum of 60 cents per ton on refined asphalt; on the production of all coal mined, the sum of 8 cents per ton of 2,000 pounds on mine-run, or coal as it is taken from the mines, including what is commonly called "slack." All such royalties shall be paid monthly, as hereinbefore provided for oil and gas.

All mineral lessees must agree to allow the lessor and his agents from time to time to enter upon and into all parts of the leased premises for purposes of inspection, and agree to keep a full and correct account of all their operations and make report thereof, under oath, promptly after the end of each month, to the lessor, and to the Secretary of the Interior, through such officer as he may designate, and their books shall be open at all times to the examination of such

officers of the Department as shall be instructed in writing by the Secretary of the Interior to make such examination.

The agent, before transmitting a lease, will ascertain whether the lessor or lessors are in fact the parties to whom the land was allotted.

SEC. 7. No person or corporation will be allowed to lease, within the territory occupied by the Creek and Cherokee Nations, for the purpose of mining for oil and gas, more than 4,800 acres of land in the aggregate.

Any oil and gas leases presented to the Department must be accompanied by an application by the lessee, for approval of such lease or leases, in the form of an affidavit, showing that the lessee is not directly or indirectly interested in any oil and gas leases or application for such leases, within the territory occupied by said nations, the lands embraced in which, with the tracts covered by the lease or leases presented for approval, would make more than 4,800 acres.

Applications to have leases approved must follow the form on page 37.

Deeds and Leases.

SEC. 8. No lease or deed will be approved that is executed prior to the approval and delivery of the deed to the allottee. Annexed to these regulations are forms of petition, deed, certificate of officer taking acknowledgment, affidavit of witnesses, grantor's affidavit, grantee's affidavit, certificate of officer who appraised the land, lease, bond and affidavit of surety, which forms must be followed in all cases All deeds and leases will be transmitted by the Indian agent, or other officer in charge, through the proper channels, for the Secretary's approval.

SEC. 9. The postoffice address of each party in interest must be given in the instrument which it is sought to have approved, and the postoffice address of each subscribing witness must appear on the papers.

SEC. 10. A lease or conveyance of undivided inherited lands, or of undivided allotments made directly to the heirs of a deceased citizen, will be approved only in cases where all the heirs join in the lease, deed, or instrument of conveyance.

SEC. 11. If inherited lands, or lands allotted directly to heirs of a deceased citizen, have been partitioned, evidence thereof must accompany a deed or instrument of conveyance of such lands.

SEC. 12. In cases where the lands embraced in a lease, deed, or instrument of conveyance were inherited from one who died after the allotment was made to him, such lease, deed, or instrument of conveyance must be accompanied by a certificate signed by two officials of the town or band of which such allottee was a member, or by two or more reliable members of the tribe, setting forth that the allottee to whom the land was originally allotted is dead, giving as nearly as possible the date of death. Such certificate shall also show the names and ages of the heirs, adults, and minors of such deceased allottee, but the Department reserves the right to require, if in its judgment it shall be considered necessary, such further and additional evidence relative to the heirship as may be deemed proper.

If the persons who certify to the death of the allottee are, from their own knowledge, unable to certify as to who are the heirs (with their names and ages) of such deceased allottee, an additional certificate made by persons of one of the two classes herein specified, showing who are the heirs and giving their names and ages (adults and minors), must be furnished. And one of the certificates above mentioned, or an additional certificate made as above specified, must set forth definitely whether or not any children were born to such deceased allottee after May 25, 1901, and whether or not such deceased allottee disposed of his homestead or any portion of his allotment by will.

SEC. 13. In cases where the lands embraced in a lease, deed, or instrument of conveyance were allotted directly to the heirs of a citizen who died before receiving an allotment, such lease, deed, or instrument of conveyance must be accompanied by a certificate signed by two officials of the town or band of which such citizen was a member, or by two or more reliable members of the tribe, setting forth the names and ages of the heirs, adults and minors, of such deceased citizen, the Department reserving the right to require additional evidence as provided in section eleven hereof.

SEC. 14. If there shall have been or shall hereafter be probate or other court proceedings establishing who are the heirs of such deceased allottee or such deceased citizen, a certified copy of the final order, judgment, or decree of the court showing and determining such heirship must be furnished; but where such court proceedings have not been had in compliance with the requirements of the provisions of sections eleven and twelve hereof, as the case may be, will be deemed sufficient to establish the heirship.

SEC. 15. In cases of transfers, leases, and sales to which minors are parties grantor, the transfer, lease, or sale must be made by a guardian, and the lease, deed, or instrument of conveyance must be accompanied by certified copies of the orders of the proper court appointing the guardian and authorizing him to make such transfer, lease, or sale, and it must be fully understood that the Department reserves the right to use any means at its disposal for the purpose of ascertaining whether the consideration given is the fair value of the land, and whether the proposed lease or sale is for the best interests of the Indian.

SEC. 16. Leases for minerals, other than coal, asphalt, oil, and gas, must be made on the form attached hereto, page 46.

Hereafter no rents, royalties, or payments accruing under any lease which has been approved by the Secretary of the Interior, or which requires his approval, shall be paid direct to the lessor, or to the guardian or curator of a minor or incompetent, but all payments to be made under any lease shall, at the times and in the amounts specified in such instrument, be deposited with the United States Indian agent at Union Agency, or with such other person as may be designated by the Secretary of the Interior to receive the same, to be turned over to the lessor or his representatives, except that rents, royalties, or payments accruing under any lease made for or on behalf of any minor or incompetent shall be deposited, by the officer to

whom the same is paid, to the credit of the guardian or curator of such minor or incompetent in some national bank or banks, to be designated by the Commissioner of Indian Affairs, and such bank or banks shall give bond, in such sum as the Commissioner of Indian Affairs may require, guaranteeing the safe care and custody of the funds so deposited, such bond to be approved by the Secretary of the Interior, and said funds shall not be withdrawn by such guardian or curator, except upon the order of the United States court for the judicial district in which the leased premises are situate. Guardians must state, under oath, whether any bonus has been paid to procure the lease, and the amount of bonus, if any, paid or to be paid, directly or indirectly, to them. This statement must be filed at the time the lease is presented to the Indian agent.

All leases which require the approval of the Secretary of the Interior must be submitted to the Indian agent, Union Agency, for transmittal within 30 days from and after the date of the execution of the lease, and all such leases which have been heretofore executed must be submitted to said agent within 30 days from the date of the approval of this amendment. No such lease presented after the time herein designated will be received by the agent or transmitted to the Department, or regarded as having any effect whatever.

Amendments of March 20, 1905.

Lessees whose leases and bonds have heretofore been approved by the Secretary of the Interior shall be required to drill at least one well on the premises covered by each lease within twelve months from the date of the approval hereof. Lessees whose leases have heretofore been approved, but bonds covering which have not yet been approved, shall be required to drill at least one well on the land covered by each lease within twelve months from the date of the approval of the bond. All lessees in whose favor leases are hereafter approved shall be required to drill at least one well on the premises covered by each lease within twelve months from the date of the approval of the bond, and should any lessee fail, neglect, or refuse to drill at least one well on the land covered by each lease within the time herein stated, the lease may, in the direction of the Secretary of the Interior, be declared null and void, with due notice to the lessee and proof of the default.

On each gas-producing well where the gas is utilized lessees shall be required to pay, at the end of each year, a royalty of $150. Failure on the part of the lessee to use a gas-producing well where the same cannot be reasonably utilized at the prescribed rate shall not work a forfeiture of the lease for oil purposes, but if the lessee desires to retain gas-producing privileges he or they shall pay a royalty of $50 per annum on each gas-producing well not utilized, the first payment to become due and to be made within thirty days from the date of the discovery of gas, but upon gas wells heretofore drilled, the gas from which is not being utilized, the first payment shall become due and be made within thirty days from the date of the approval hereof.

Subsequent payments for such wells shall be made in advance at the first of each succeeding year, dating from the first payment.

Lessees who have leases now pending in the Union Agency and those who may hereafter submit leases shall each be required to make a satisfactory showing to the Department that said lessees have taken said leases in good faith for the purpose of mining oil, and not for speculation and resale, and that they have the business capacity and financial ability to perform all the requirements specified in said leases.

With the consent of the United States Indian agent, lessees may make arrangements with the purchasers of oil for the payment of the royalty to the United States Indian agent by such purchasers, but such arrangement, if made, shall not operate to relieve lessees from the responsibility for the payment of the royalty, should such purchasers fail, neglect, or refuse to pay the same when it becomes due.

Amendment of April 22, 1905.

Hereafter the papers accompanying leases made with a corporation and a guardian shall be:

(1) Sworn application upon form provided by Department.

(2) Statement from Commission to the Five Civilized Tribes verifying allotment.

(3) Affidavit of some representative of oil company showing no operations and payment of bonus.

(4) Certified copy of articles of incorporation.

(5) If a foreign corporation, certificate of clerk of Indian Territory court of appeals showing compliance with Indian Territory corporation law.

(6) Evidence in the form of a single affidavit of the secretary of the company, or by the president, showing authority for the officers to execute the lease, bond, and other papers.

(7) Financial statement made by an officer of the company showing the amount of capital stock issued and actually paid in and money available for mining operations; that the lease is taken in good faith and not for speculation and resale. Also statement showing $5,000 set aside for developing the particular lease and where the same is deposited, together with certificate from such depository of the fact of such deposit, but not as to the intentions of the depositor.

(8) Certified copy of appointment of guardian.

(9) Certified copy of order of court authorizing guardian to enter into lease, and confirmatory order.

(10) Affidavit of guardian showing his relationship to, and age of the minor, and whether any bonus paid, and the amount thereof, if any paid or to be paid directly or indirectly to said guardian.

No plat will be required with oil and gas leases, but with leases covering other minerals there shall be furnished a map or a sufficiently large scale to show the part or parts of the allotment which are supposed to be underlaid by such minerals.

Where the lessee is an individual the following papers will suffice:
(1) Sworn application upon the form provided by the Department.
(2) Statement from the Commission to the Five Civilized Tribes verifying allotment.
(3) Affidavit of lessee or his representative showing no operations and the payment of bonus.
(4) Financial statement, with necessary statement from bank and other evidence required to accompany same.
But where the lessor is a minor the following additional papers should be furnished.
(5) Certified copy of appointment of guardian.
(6) Certified copy of order of court authorizing guardian to enter into lease, and confirmatory order.
(7) Affidavit of guardian showing his relationship to, and age of, minor, and whether any bonus paid, and the amount thereof, if any paid or to be paid directly or indirectly, to said guardian.

Amendment of May 23, 1905.

Every lessee shall securely cap or plug each oil or gas well upon the land leased within three days after the same is abandoned or not used, and every lessee failing to securely cap or plug his oil or gas well, as above required, shall pay the United States Indian agent for the Union Agency, for the use of the lessor, the sum of $10 per day for each well during the time said well or wells remain not capped or plugged, and for any failure on the part of the lessee to comply with any rule or regulation or any obligation in his lease, the Secretary of the Interior may revoke his approval of any such lease, after due notice to the lessee. This regulation shall be applicable to leases heretofore made as well as those hereafter entered into.

Amendment of June 8, 1905.

In order that the Department may have definite information before it concerning the lessees in oil and gas leases covering lands in the Cherokee and Creek Nations, it is required that corporation lessees furnish affidavits covering the following points:
(1) State the total number of shares of the capital stock actually issued and specifically the amount of cash paid into the treasury on each share sold, or if paid in property, state kind, quantity, and value of the same paid per share. (2) Of the stock sold, how much per share remains unpaid and subject to assessment? (3) How much cash has the company in its treasury and elsewhere, and from what sources was it received? Certificates by officers of the banks should be furnished showing the amount deposited therein to the credit and subject to the check of the company. (4) What property, exclusive of cash, is owned by the company, and its value? (5) What is the total indebtedness of the company, and specifically the nature of its obligations? (6) State what experience the officers of the company or others connected with or employed by it have

had in the production of petroleum and gas, or in any other business.

Affidavits should also be furnished by individual lessees showing their financial responsibility, the amount of cash on hand available for mining operations, and their experience in the oil and gas business or other business. They should also submit affidavits by bank officers showing the amounts deposited to their credit.

The required information shall be furnished within fifteen days from the date of the letter of the Indian agent at Union Agency requesting it.

These amendments shall be applicable to all leases heretofore approved, as well as to those that may hereafter be approved.

Amendment of December 27, 1905.

Lessees shall not be allowed to drill oil or gas wells within one hundred and fifty feet of the division line between the lands covered by their leases and adjoining lands, whether the latter lands are leased or unleased, allotted or unallotted.

F. E. LEUPP,
Commissioner.

Department of the Interior, Washington, D. C.
Approved December 27, 1905.
E. A. HITCHCOCK, *Secretary.*

Forms.

Petition for the Sale of Creek Lands.

[If allottee is married, petition must be signed by allottee and wife, or allottee and husband, as the case may be. If allottee is a minor, petition must be signed by guardian.]

United States Indian Agent, Union Agency, Muskogee, Ind. T.

SIR: ....., the undersigned, respectfully show.. that..... ....., the owner.. of the following-described land, situate in the Creek Nation, Ind. T., to-wit, ...
.....
.....
that said described land was allotted to.....
by the Commission to the Five Civilized Tribes; that allotment deed therefor was delivered to.....by the principal chief of the Creek Nation on the.....day of....., 190..; that the land is not a homestead; that said.....is a citizen of the Creek Nation, and that.....name appears on the approved Creek roll opposite number.....; that of said described land.....acres are in cultivation; that the same is improved as follows: .....
.....
the reasonable value of which does not exceed.....dollars, and that said .....believe.. that .....interests

will be best subserved by permitting.....to sell the above-described land for the following reasons, to-wit: .....
.....
.....
.....
.....
and ..... consider .....dollars the reasonable value of the land; and it is agreed that the proceeds to be derived from the sale thereof shall be placed with the most convenient United States depository to the credit of the person selling the said land, subject to check, properly drawn by or in behalf of such person.., for amounts not exceeding, in the aggregate, fifty dollars to each person in any one month, when approved by the agent or other officer in charge, and only when so aproved, and if same is in excess of fifty dollars per month, upon the approval of such agent, only when specifically authorized by the Commissioner of Indian Affairs.

.....
.....
.....
.....

In presence of:

Name.....
P. O. .....
Name.....
P. O. .....

[Endorsed.]

No. .....

Petition for the sale of the following described lands, Creek Nation, I. T., ...
.....
.....

Petitioner..

.....
.....
.....

UNION AGENCY, MUSKOGEE, I. T., ..., 190...

Petition to sell the above-described land was received by me on the.....day of....., 190.. The land will be listed for sale on the.....day of....., 190..

.....
U. S. Indian Agent.

General Warranty Deed.

This indenture, made and entered into this..... day of..... one thousand nine hundred and....., by and between.....
.....
of ....., part.. of the first part, and .....
.....
of ....., part.. of the second part.

Witnesseth: That the said part.. of the first part, for and in consideration of ..... dollars, in hand paid, the receipt of which is hereby acknowledged, do.. hereby grant, bargain, sell, convey, and confirm unto said part.. of the second part the following-described real estate and premises situate in the Muskogee or Creek Nation, and within the limits of the Indian Territory, to-wit: .....
.....
.....
.....
together with all the improvements thereon, and appurtenances and immunities thereunto belonging or in any wise appertaining thereto, and warrant the title to the same, subject to any valid existing lease upon the premises.

And, I, ...wife of the said ....., for and in consideration of the said sum of money, do hereby release and relinquish unto the said part.. of the second part all my right of dower and homestead in and to the said lands.

To have and to hold the said lands unto the said part.. of the second part, ... heirs, executors, administrators, successors, or assigns forever.

In witness whereof, the said part.. of the first part ha.. hereunto set.....hand.. and seal.. the day and year first above written.

Witnesses:

.....
P. O.....
.....
P. O.....
} as to.....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to.....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to.....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

UNITED STATES OF AMERICA, INDIAN TERRITORY,
Western Judicial District, ss:

Be it remembered that on this day came before me, the undersigned....., within and for the western judicial district of Indian Territory aforesaid, duly commissioned and acting as such, ...
to me personally well known as ..... the part.. grantor.. in the within and foregoing deed of conveyance, and stated that.. executed the same for the consideration and purposes therein mentioned and set forth, and I do hereby so certify.

And I further certify that on this day also voluntarily appeared before me the said....., wife of said ....., to me personally well known to be the person whose name appears upon the within and foregoing, and in the absence of her said husband declared that she had of her own free will executed said deed, and signed and sealed the relinquishment of dower and homestead therein expressed for the consideration and purposes therein contained and set forth without compulsion or undue influence of her said husband.

Witness my hand and seal as such.....on this.....day of ....., 190..

.....
.....

(My commission expires .....)

[Endorsed:]

WARRANTY DEED.

Creek Nation, I. T.

From

.....
.....
.....

To

.....
.....
.....

.....

....., *ss:*

Filed for record this ..... day of ....., 190.., at ..... o'clock, ...m.

.....

By .....

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE,
UNION AGENCY,

MUSKOGEE, I. T., ..., 190..

The within deed is forwarded to the Commissioner of Indian Affairs with recommendation that it be.....

.....

See my report of even date.

.....

U. S. Indian Agent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,

WASHINGTON, D. C., ..., 190..

The within deed is respectfully submitted to the Secretary of the Interior, with recommendation that it be.....

.....

.....

Commissioner.

DEPARTMENT OF THE INTERIOR,

WASHINGTON, D. C., ..., 190..

The within deed is hereby .....

.....

.....

Secretary of the Interior.

Certificate of Officer Taking Acknowledgment.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

I, ..., a ....., within and for the western judicial district of the Indian Territory, hereby certify that ..... and ....., witnesses to the attached deed, signed the same in my presence at the request of the grantor..; that they are personally well known to me and that I know of my own knowledge that they are reputable persons and entitled to full faith and credit. I further certify that the deed was in my presence read to the grantor.., and that the con-

tents, purport, and effect of the deed were fully explained to the grantor.. by me, and that .... approved and signed the same in my presence; that the consideration specified in the deed is the fair value of the land; that the conveyance is in every respect free from fraud or deception, and that the land described in the deed is no part of the grantor's homestead.

Witness my hand and seal as such ..... this ..... day of ....., 190..

.....

.....

Affidavit of Witnesses.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

..... and ....., witnesses to the attached deed, being by me first duly sworn, upon their oaths state, each for himself, that said deed was in their presence read and fully explained to the grantor..; that ..... understood the nature, contents, and effect thereof and approved and signed the same in their presence.

.....

.....

Subscribed in my presence and sworn to before me this ..... day of ....., 190..

.....

.....

(My commission expires .....)

Grantor's Affidavit.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

.....

....., grantor.. in the deed hereto attached, being first sworn on oath, say..: That the sale of said described land is bona fide; that there is no contract, agreement, or understanding, written or verbal, whereby the consideration money or price paid for the land, or any portion thereof, is to be refunded to the purchaser after the approval of the deed, and that no live stock, implements, or other thing or things of value are to be taken or exchanged in lieu of said consideration money, or any portion thereof; that neither the grantee, his agent, or employee has directly or indirectly paid, loaned, promised, or given to me, or to any one for me, any money or other thing of value as an advancement on the purchase price of the land, or as a consideration for or inducement to the sale of the land and the execution of the deed therefor, nor for any other purpose. The grantor.. also state..

that of said land ..... acres are in cultivation, and that the same is improved as follows:.....
.....
.....
the reasonable value of which does not exceed ..... dollars.
.....
.....
.....

Subscribed in my presence and sworn to before me this ..... day of ....., 190..
.....
.....

(My commission expires.....)

Grantee's Affidavit.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

....., grantee.. in the deed attached hereto from .....
to ....., make.. oath and say..: That there is no contract, agreement, or understanding, written or verbal, whereby the consideration, money, or price paid for the land, or any portion thereof, is to be refunded to the purchaser after the approval of the deed; that no live stock, implements, articles, or other things of value are to be exchanged or taken in lieu of said consideration, money, or purchase price, or any portion thereof, for such land; and that I am not a party to any association or combination of persons to acquire said lands at less than their fair value, or to prevent open and fair competition in the purchase and sale of lands within the limits of the Indian Territory; that I am not directly or indirectly connected with or interested in any device, scheme, or plan to prevent or interfere with fair competition in the purchase of said lands or to secure them at less than their market value; and that the contract under which the deed presented for approval was executed was not procured through or by means of any such device, scheme, or plan; that such contract was not secured through false representations to the grantor.. or by suppression of facts as to the value of the land or as to any other feature of the transaction; and that neither the grantor.. nor any one acting for ..... or in ..... place ha.. been given or promised any money or other thing by me or by any one with my advice, knowledge, or consent, except the consideration named in the deed, to induce ..... to agree to such sale of ..... lands; that neither myself, my agent, or employee has directly or indirectly paid, loaned, promised, or given to the grantor, or to any one for him, any money or other thing of value as an advancement on the purchase price or as a consideration for, or inducement

to, the sale of the land and the execution of the deed therefor, nor for any other purpose.

.....

Subscribed in my presence and sworn to before me this ..... day of ....., 190..

.....

.....

(My commission expires.....)

Certificate of Officer who Appraised the Land.

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

I, [1].....,certify that I visited, viewed, and appraised the following-described land, to-wit: ..... Sec. ....., T. ....., R. ....., which has heretofore been allotted to ..... by the Commission to the Five Civilized Tribes. I find that the same is improved as follows:..... ....., which improvements do not exceed in value ..... dollars; that the land is of the following character: ..... I further certify that the sum of ..... dollars, the total appraised value, including the improvements, is a fair, reasonable, and just price for said land, according to my best judgment.

.....

....., 190..

I hereby certify that ....., who is a person of integrity, is well informed as to the value of lands in the Creek Nation; also that I believe that the appraisement made by him shows the true value of the land.

.....
U. S. Indian Agent.

....., 190..

Transferable Only with Consent of the Secretary of the Interior.

[1] Give name and official position.

Agricultural Lease, Creek Nation, Indian Territory.

(Sec. 17, Act of June 30, 1902, 32 Stat., 500.)

[Write all names and addresses in full.]

This indenture, made and entered into, in quadruplicate, on this ..... day of ....., A. D., 19.., by and between .....
of .....
part.. of the first part, and .....
.....
of .....
part.. of the second part, under and in accordance with the provisions of Section 17 of the act of Congress approved June 30, 1902, and ratified by the Muskogee or Creek national council on July 26, 1902, and the rules and regulations prescribed by the Secretary of the Interior relative to agricultural leases in the Creek Nation.

Witnesseth: That the said part.. of the first part, for and in consideration of the covenant.. of the said part.. of the second part, hereinafter set forth, do.. by these presents lease to said part.. of the second part, for agricultural purposes only, the following described tract of land, lying and being within the Creek Nation and within the Indian Territory, to-wit: .....
.....
.....
of section ....., of township ....., of range ....., of the Indian Meridian, and containing ..... acres, more or less, for the full term of ..... years from the date hereof. And the said part.. of the second part, in consideration of said premises as above set forth, covenant.. and agree.. with the part.. of the first part to pay the said part.. of the first part as rental for the same the sum of ..... dollars, being at the rate of..... dollars per acre, payable as follows, to-wit .....
.....
.....

Said part.. of the second part further covenant.. and agree.. that ..... will at ..... own expense, within ..... years from the date of the approval hereof by the Secretary of the Interior, inclose the leased premises by a barbed-wire fence of three strands, strung on posts set or driven two feet into the ground and not more than sixteen and one-half feet apart and of the material usually used in the Creek Nation for this purpose; that all improvements, such as hogpens, cattle, corrals, etc., shall be constructed in a substantial manner and of durable material, and that..... will build and erect other improvements on said premises as follows: ....
.....
.....
.....
that ..... will within ..... years from the date of said

approval plant ..... acres of the leased premises in fruit of the following kinds or classes: (*a*) .....
.....
.....
.....
and that ..... will break out and put into a proper state of cultivation each year acreage as follows: First year, ... acres; second year, ... acres; third year, ... acres; fourth year, ... acres; fifth year, ... acres; sixth year, ... acres; seventh year, ... acres; eighth year, ... acres; ninth year, ... acres; tenth year, ... acres.

Said part.. of the second part further covenant.. and agree.. that ..... will, and at ..... own expense, insure against loss by fire in some reliable fire insurance company, at their reasonable insurable value, all buildings now on said leased premises or that may hereafter be erected thereon by or for said part.. of the second part, or by anyone holding under said part.. of the second part as a sublessee, or otherwise.

Said part.. of the second part further covenant.. and agree.. that in case any of the buildings now on said leased premises, or any of those hereafter erected thereon during the life of this lease, under the provisions hereof, shall be destroyed by fire ..... will, immediately after such destruction, erect thereon another building or buildings, as the case may be, equally as substantial and appropriate for the purpose for which used as was or were the building or buildings destroyed as aforesaid.

The said part.. of the second part further covenant.. and agree.. that at the expiration of the time mentioned in this lease ..... will surrender to the said part.. of the first part peaceable possession of the leased premises in good condition, the usual wear and unavoidable accidents excepted, and that ..... failure, neglect, or refusal to pay the rental, or any part thereof, when the same becomes due and payable, as herein provided, shall work a forfeiture of this lease, and entitle the part.. of the first part, or whomsoever shall be lawfully entitled to said premises, to enter and take possession of the same.

It is understood and agreed by the parties hereto that the use of the leased premises by said part.. of the second part, or by anyone holding under ..... as a sub-lessee, or otherwise, for any purpose not covered by this lease, or the failure by the part.. of the second part to pay the rental when the same becomes due, or in case the part.. of the second part fail.., neglect... or refuse.. to make the improvements herein specified within the time mentioned, such failure, neglect, or refusal shall work a forfeiture hereof.

It is further understood by the parties hereto that the part.. of the second part will not permit any nuisance to be maintained on the premises nor allow any intoxicating liquors to be sold or given away for any purpose on the leased premises, and failure to comply with these conditions shall work a forfeiture hereof.

---

a Here give number of each kind or class.

It is further understood and agreed by the parties hereto that all buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration of this lease, in addition to the other considerations herein specified.

It is further understood and agreed by the parties hereto that no sublease, assignment, or transfer of this lease, or of any interest therein or thereunder, can be directly or indirectly made without the written consent thereto of the lessor.. and the Secretary of the Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void.

The covenants herein contained shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the parties to this lease, and this lease shall be subject to all rules and regulations heretofore prescribed by the Secretary of the Interior, or which may be hereafter prescribed by him.

The part.. of the second part hereby acknowledge ..... to be firmly bound for the faithful performance of the stipulations of this indenture or lease by and under the bond made and executed by the part.. of the second part as principal.. and.....
.....
.....
as suret...., entered into the ..... day of ..... and which shall remain on file in the Indian Office during the life of this lease.

In testimony whereof the parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above written.

Witnesses: (*a*)

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

---

a Two witnesses to all signatures.

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

[Endorsed:]

Department of the Interior,

Washington, D. C.

Agricultural Lease,

Creek Nation, I. T.

.....
.....

To

.....
.....
.....

Of

.....
.....

Sec. ....., Tp. ....., Range.....
in the Creek Nation, Indian Territory.
Dated ....., 190..
Expires ....., 19...

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE,
UNION AGENCY,
MUSKOGEE, I. T....., 190..

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be .....
See my report of even date.

.....
U. S. Indian Agent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C....., 190..

Respectfully submitted to the Secretary of the Interior with recommendation that it be .....
.....

.....
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C.,....., 190..

.....

.....
Secretary of the Interior.

Transferable Only With Consent of the Secretary of the Interior.

Grazing Lease, Creek Nation, Indian Territory.

(Sec. 17, Act of June 30, 1902, 32 Stat., 500.)

[Write All Names and Addresses in Full.]

This indenture made and entered into, in quadruplicate, on this .....day of....., A. D. 190.., by and between.....
of .....
part.. of the first part, and.....
.....
.....
.....
.....
of .....
part.. of the second part, under and in accordance with the provisions of Section 17 of the act of Congress approved June 30, 1902, and ratified by the Muskogee or Creek national council on July 26, 1902, and the rules and regulations prescribed by the Secretary of the Interior relative to grazing leases in the Creek Nation, Indian Territory.

Witnesseth: That said part.. of the first part, for and in consideration of the covenant.. of the said part.. of the second part, hereinafter set forth, do.. by these presents lease to said part.. of the second part, for grazing purposes only, the following described tract of land lying and being within the limits of the Creek Nation and within the Indian Territory, to-wit: .....
.....
.....
of section....., of township....., of range....., of the Indian Meridian, and containing.....acres, more or less, for the full term of.....years from date hereof, and the said part.. of the second part, in consideration of said premises, as above set forth, covenant.. and agree.. with the part.. of the first part to pay said part.. of the first part as rental for the same, the sum of..... dollars, being at the rate of.....dollars per acre, payable as follows, to-wit: .....
.....
.....

Said part.. of the second part further covenant.. and agree.. that .....will at.....own expense, within.....years from the date of the approval hereof by the Secretary of the Interior, inclose the leased premises by a barbed wire fence of three strands, strung

on posts set or driven two feet into the ground not more than sixteen and one-half feet apart, and of the material usually used in the Creek Nation for this purpose; that all improvements made, such as hogpens, cattle corrals, etc., shall be constructed in a substantial manner and of durable material, and that..... will erect and build other improvements on said leased premises as follows: .....
.....
.....

Said part.. of the second part further covenant.. and agree.. that at the expiration of the time mentioned in this lease.....will surrender to said part.. of the first part peaceable possession of the leased premises in good condition, the usual wear and unavoidable accidents excepted, and that failure, neglect, or refusal to pay the rental, or any part thereof, when the same becomes due and payable, as herein provided, shall work a forfeiture of this lease and entitle the part.. of the first part, or whomsoever shall be lawfully entitled to said premises, to enter and take possession of the same.

Said part.. of the second part further covenant.. and agree.. that.....will comply with all the quarantine laws or customs in force in the Creek Nation, Indian Territory, as to excluding diseased or infected cattle or other animals from the premises, and that .....will comply with such regulations as may be adopted by the Secretary of the Interior in the matter, and that.....will comply with all the regulations at any time adopted by said Secretary to prevent other allotments of individual Indians or tribal lands from damage or interference by.....cattle or other animals, and will not in any manner intrude on other Indian allotments.

It is understood and agreed by the parties hereto that the use of the leased premises by said part.. of the second part, or by anyone holding under.....as a sublessee, or otherwise, for any purpose not covered by this lease, or the failure by the part.. of the second part to pay the rental when the same becomes due, or in case the part.. of the second part fail.., neglect.., or refuse.. to make the improvements herein specified within the time mentioned, such failure, neglect, or refusal shall work a forfeiture hereof.

It is further understood and agreed by the parties hereto that the part.. of the second part will not permit any nuisance to be maintained on the premises nor allow any intoxicating liquors to be sold or given away for any purpose on the leased premises, and failure to comply with these conditions will work a forfeiture of the lease.

It is further understood and agreed by the parties hereto that all buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration of this lease in addition to the other considerations herein specified.

It is further understood and agreed by the parties hereto that no sublease, assignment, or transfer of this lease, or of any interest therein or thereunder, can be, directly or indirectly, made without the written consent thereto of the lessor.. and the Secretary of the

Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void.

The covenants herein contained shall extend to and be binding upon the heirs, executors, administrators, successors, and assigns of the parties to this lease, and this lease shall be subject to all rules and regulation- prescribed by the Secretary of the Interior, or which may be hereafter prescribed by him.

The part.. of the second part hereby acknowledge.....to be firmly bound for the faithful performance of the stipulations of this indenture of lease by and under the bond made and executed by the part.. of the second part as principal.. and.....
.....
.....
as suret.., entered into the.....day of....., and which shall remain on file in the Indian Office during the life of this lease.

In testimony whereof the parties of the first and second parts herein have set their hands and affixed their seals the day and year first above written.

Witnesses:[a]

.....
P. O. .....
.....
P. O. ..... } as to..... [SEAL.]

.....
P. O. .....
.....
P. O. ..... } as to..... [SEAL.]

.....
P. O. .....
.....
P. O. ..... } as to..... [SEAL.]

.....
P. O. .....
.....
P. O. ..... } as to..... [SEAL.]

---

[a] Two witnesses to all signatures.

[Endorsed:]

Department of the Interior,
Washington, D. C.

Grazing Lease.

Creek Nation, I. T.

.....
.....

To

.....
.....
.....

Of

.....
.....

Sec. ..... Tp. ..... Range .....
in the Creek Nation, Indian Territory.
Dated....., 190..
Expires....., 19...

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE, UNION AGENCY,
MUSKOGEE, I. T., ..., 190..

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be.....
See my report of even date.

.....,
U. S. Indian Agent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., ..., 190..

Respectfully submitted to the Secretary of the Interior with recommendation that it be .....

.....,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., ..., 190..

.....

.....,
Secretary of the Interior.

Application for ..... Mining Lease.

To the Secretary of the Interior:

....., of ....., desiring to avail ..... of the provisions of section seventeen of the act of June 30, 1902 (32 Stat., 500), hereby make.. application to have approved the accompanying lease for the purpose of ....., embracing, in the aggregate, ... acres of land, situated in the Creek Nation, Indian Territory.

....., solemnly swear that the attached map shows the amount of land of each subdivision supposed to be underlaid with ....., and the quantity that can probably be mined; also that this application is not made for speculation but in good faith and with no other object than that of ..... also swear that ..... not directly or indirectly interested in any oil and gas lease for any of the lands within the territory occupied by the Creek and Cherokee nations in the Indian Territory, or application for such lease, the lands embraced in which, with the tract.. covered by the lease.. herewith presented, would make more than 4,800 acres.

The date of execution of each lease, the approval of which is requested, together with the name of the lessor and the number of acres applied for therein, is as follows:

Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.
Lease executed ....., 190.., by ....., for ..... acres.

.....
.....
.....

UNITED STATES OF AMERICA,
Indian Territory, Western Judicial District, ss:

Sworn to and subscribed before me this ..... of ....., 190..

.....
.....

(My commission expires .....)

Department of the Interior,
Washington, D. C.,....., 190..

.....
.....
Secretary.

Transferable Only With Consent of the Secretary of the Interior.

Coal and Asphalt Mining Lease, Creek Nation, Indian Territory.

(Sec. 17, Act of June 30, 1902, 32 Stat., 500.)

[Write all names and addresses in full.]

This indenture of lease made and entered into, in quadruplicate, on this ..... day of ....., A. D., 190.., by and between ..... of ..... part .. of the first part, and.....
.....
.....
.....
of .....
part.. of the second part, under and in pursuance of the provisions of Section 17 of the act of Congress approved June 30, 1902, and ratified by the Muskogee or Creek national council on July 26, 1902, and the rules and regulations prescribed by the Secretary of the Interior relative to mining leases in the Creek Nation.

Witnesseth: That the part.. of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the part.. of the second part, ... heirs, executors, administrators, successors, or assigns, do hereby demise, grant, and let unto the part.. of the second part, ... heirs, executors, administrators, successors, or assigns the following described tract of land lying and being within the Creek Nation and within the Indian Territory, to-wit: .....
.....
.....
of section ....., of township ....., of range....., of the Indian Meridian, and containing ..... acres, more or less, for the full term of ..... years from the date hereof, for the sole purpose of prospecting for and mining coal and asphalt; the part.. of the second part to occupy so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing such coal and asphalt.

In consideration of the premises the part.. of the second part hereby agree.. and bind ....., ..., heirs, executors, administrators, successors, or assigns to pay, or cause to be paid, to the part.. of the first part as royalties the sums of money as follows, to-wit:

On asphaltum the sum of ten cents per ton for each and every ton of crude asphalt produced, weighing 2,000 pounds, or the sum of sixty cents per ton on refined asphalt. On the production of all coal mined under this lease the sum of eight cents per ton of 2,000 pounds on mine run, or coal as it is taken from the mines, including what is commonly called "slack."

And the part.. of the second part further agree.. and bind ....., ..., heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the lessor.., as advanced annual royalty on this lease, the sums of money as follows, to-wit: Fifteen cents per acre per annum in advance, for the first and second years; thirty cents per acre per annum, in advance, for the third and fourth years; and seventy-five cents per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty, and further, that should the part.. of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessor.., be null and void, and all royalties paid in advance shall become the money and property of the lessor...

All royalty accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

It is agreed by the parties hereto that the land described herein shall not be held by the part.. of the second part for speculative purposes, but in good faith for mining the minerals specified; and a failure for one year by the part.. of the second part to do a reasonable amount of development work or of mining shall be held as a want of compliance with the purposes of this lease and shall render it null and void.

The part.. of the second part ..... further agree.. and bind ....., ... heirs, executors, administrators, successors, or assigns, to pay, or cause to be paid, to the part.. of the first part the royalty as it becomes due.

The part.. of the second part further covenant.. and agree.. to exercise diligence in the conduct of the prospecting and mining operations .....
.....
and to open mines and operate the same in a workmanlike manner and to the fullest possible extent on the leased premises; to commit no waste upon said premises or upon the mines that may be thereon and to suffer no waste to be committed thereon; to take good care of the same and to surrender and return the premises at the expiration of this lease to the part.. of the first part, or to whomsoever shall be lawfully entitled thereto, in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by.....
.....
the part.. of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, except engines, tools, boilers, boiler houses, and machinery, which shall remain the

property of said part.. of the second part; that ..... shall not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away for any purpose on the premises, and that ..... will not use the premises for any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that..... will not at any time during the term hereby granted assign, transfer, or sublet .....estate, interest, or term in said premises and land or the appurtenances thereto to any person or persons whomsoever without the written consent thereto of the part.. of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said part.. of the second part further covenant.. and agree.. that ..... will allow said lessor.... and his agents, from time to time, to enter upon and into all parts of said premises for purposes of inspection, and agree.. to keep an accurate account of all mining operations, showing the whole amount of mineral mined or removed, and make report thereof promptly, under oath, at the end of each month to the lessor... and to the Secretary of the Interior through such officer as he may designate, and that all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all the mineral obtained from the land herein leased, as security for the payment of said royalties.

And the part.. of the second part agree.. that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to such mineral leases in the Creek Nation; and said part.. of the second part expressly agree.. that should ..... sublessees, ... heirs, executors, administrators, successors, or assigns violate any of the covenants, stipulations, or provisions of this lease, or fail, for the period of sixty days, to pay the stipulated monthly royalty provided for herein, then the part.. of the first part shall be at liberty, in ..... discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the part.. of the second part.., sublessees, executors, administrators, successors, or assigns hereunder shall cease and end without further proceedings.

If the lessee.. make.. reasonable and bona fide effort to find and mine coal and asphalt in paying quantity, as is herein required of ....., and such effort is unsuccessful ..... may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all ..... then existing obligations hereunder: Provided, however, That approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that this lease shall be of no force or effect unless the part.. of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the revised regulations of March 20, 1905, prescribed by the Secretary

of the Interior, which shall be deposited and remain on file in the Indian Office during the life of this lease.

In witness whereof the said parties of the first and second parts have hereunto set their hands and affixed their seals the day and year first above written.

Witnesses: (*a*)

.....

P. O..... as to.....[SEAL.]

.....

P. O.....

.....

P. O..... as to.....[SEAL.]

.....

P. O.....

.....

P. O..... as to.....[SEAL.]

.....

P. O.....

.....

P. O..... as to.....[SEAL.]

.....

P. O.....

[Endorsed.]

Department of the Interior,
Washington, D. C.

Coal and Asphalt Mining Lease.

Creek Nation, I. T.

.....

.....

To

.....

.....

.....

Of

.....

.....

Sec....., Tp....., Range..... in the Creek Nation, Indian Territory.

Dated....., 190..

Expires....., 19...

(*a*) Two witnesses to all signatures.

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE, UNION AGENCY,
MUSKOGEE, I. T., ..., 190..

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be.....
See my report of even date.

.....,
U. S. Indian Agent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., ..., 190..

Respectfully submitted to the Secretary of the Interior with recommendation that it be.....

.....,
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., ..., 190..

.....

.....,
Secretary of the Interior.

Transferable Only with Consent of the Secretary of the Interior.

Oil and Gas Mining Lease upon Land Selected for Allotment, Creek Nation, Indian Territory.

[Sec. 17, Act of June 30, 1902, 32 Stat., 500.]

This Indenture of Lease, Made and entered into, in quadruplicate, on this.....day of....., A. D. 190.., by and between....
.....
.....
of .....
part.. of the first part, and.....
.....
.....
of .....
part.. of the second part, under and in pursuance of the provisions of Section 17 of the act of Congress approved June 30, 1902, and the regulations prescribed by the Secretary of the Interior thereunder.

Witnesseth: That the part.. of the first part, for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained, and hereby agreed to be paid, observed and performed by the part.. of the second part, ...successors and assigns, do.. hereby demise, grant, and let unto the part.. of the second part, ... successors and assigns, for the term of.... years from the date hereof, all of the oil deposits and natural gas in or under the following described tract of land, lying and being within

the Creek Nation, and within the Indian Territory, to-wit: The .....
.....
of section ....., township ..... north, range ..... east, of the Indian Meridian, and containing ..... acres, more or less, with the right to prospect for, extract, pipe, store, refine, and remove such oil and natural gas, and to occupy and use so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land, by means of pipe lines or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas as fuel so far as it is necessary to the prosecution of said operations.

In consideration of which the part.. of the second part hereby agree.. and bind....., ... successors and assigns, to pay or cause to be paid to the lessor.. as royalty the sum of ten per cent of the value, on the leased premises, of all crude oil extracted from the said land, and if the parties do not, before the tenth day of the month succeeding its extraction, agree upon the value of the crude oil on the leased premises, the value thereof shall finally be determined under the direction of the Secretary of the Interior in such manner as he shall prescribe, and to so pay the royalty accruing for any month on or before the twenty-fifth day of the month succeeding, and where the value of the crude oil fluctuates, the average value during the month shall constitute the criterion in computing the royalty; and to pay in yearly payments, at the end of each year, one hundred and fifty dollars royalty on each gas-producing well, the lessor.. to have free the use of gas for lighting and warming his residence on the premises. But failure on the part of the lessee.. to use a gas-producing well, where the same cannot be reasonably utilized at the rate so prescribed, shall not work a forfeiture of this lease so far as the same relates to mining oil, but if the lessee desires to retain gas producing privileges ..... shall pay a royalty of fifty dollars per annum on each gas-producing well not utilized, the first payment to become due and to be made within thirty days from the date of the discovery of gas, payments thereafter for such wells to be made in advance at the first of each succeeding year, dating from the first payment.

And the part.. of the second part further agree.. and bind.... ..... successors and assigns, to pay or cause to be paid to the lessor.., as advanced annual royalty on this lease, the sums of money as follows, to-wit: Fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance, for the third and fourth years; and seventy-five cents per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty, and further, that should the part.. of the second part neglect or refuse to pay such advanced annual royalty for the

period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessor.. be null and void, and all royalties paid in advance shall become the money and property of the lessor..

The part.. of the second part further covenant.. and agree.. to exercise diligence in the sinking of wells for oil and natural gas on the lands covered by this lease, and to drill at least one well thereon within twelve months from the date of the approval of the bond by the Secretary of the Interior, and should the part.. of the second part fail, neglect, or refuse to drill at least one well within the time stated, this lease may, in the discretion of the Secretary, be declared null and void, with due notice to the lessee and proof of the default; and said part.. of the second part agree.. to operate the same in a workmanlike manner to the fullest possible extent, unavoidable casualties excepted; to commit no waste upon the said land, and to suffer no waste to be committed upon the portion in ..... occupancy or use; to take good care of the same, and to promptly surrender and return the premises upon the termination of this lease to the part.. of the first part or to whomsoever shall be lawfully entitled thereto, and not to remove therefrom any buildings or improvements erected thereon during the said term by the said part.. of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, excepting that tools, boilers, boiler houses, pipe lines, pumping and drilling outfits, tanks, engines, and machinery and the casing of all dry or exhausted wells, shall remain the property of the said part.. of the second part, and may be removed at any time before the expiration of sixty days from the termination of the lease; that ..... will not permit any nuisance to be maintained on the premises under ..... control, nor allow any intoxicating liquors to be sold or given away for any purposes on such premises; that ..... will not use such premises for any other purpose than that authorized in this lease, and that before abandoning any well ..... will securely plug the same so as to effectually shut off all water above the oil-bearing horizon.

And it is mutually understood and agreed that no sublease, assignment, or transfer of this lease or of any interest therein or thereunder can be directly or indirectly made without the written consent thereto of the lessor.. and the Secretary of the Interior first obtained, and that any such assignment or transfer made or attempted without such consent shall be void.

And the said part.. of the second part further covenant.. and agree.. that ..... will keep an accurate account of all oil-mining operations, showing the whole amount of oil mined or removed; and all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all of the oil obtained from the land herein leased, as security for the payment of said royalties.

And the part.. of the second part agree.. that this indenture of lease shall in all respects be subject to the rules and regulations here-

tofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Creek Nation.

And the said part.. of the second part expressly agree.. that should ..... or ..... sublessees, heirs, executors, administrators, successors, or assigns violate any of the covenants, stipulations, or provisions of this lease, or fail for the period of sixty days to pay the stipulated monthly royalty provided for herein, then the part.. of the first part shall be at liberty, in ..... discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the part.. of the second part, ... sublessees, heirs, executors, administrators, successors, or assigns hereunder shall cease and end without further proceedings.

If the lessee.. make.. reasonable and bona fide effort to find and produce oil in paying quantity as is herein required of....., and such effort is unsuccessful, ... may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all ..... then existing obligations hereunder: Provided, however, That approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that this lease shall be of no force or effect unless the part.. of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the regulations of July 10, 1903, prescribed by the Secretary of the Interior.

In witness whereof, The said parties have hereunto subscribed their names and affixed their seals on the day and year first above mentioned.

..... [SEAL.]
..... [SEAL.]
..... [SEAL.]

Attest:

.....

Two witnesses to execution by lessor:

.....
P. O .....
.....
P. O .....

Two witnesses to execution by lessee:

.....
P. O .....
.....
P. O .....

[Endorsed:]

Department of the Interior,
Washington, D. C.

Oil and Gas Mining Lease.

Creek Nation, I. T.

.....
.....

To

.....
.....
.....

Of

.....
.....

Sec. ....., Tp. ..... N., Range ..... E., in the Creek Nation, Indian Territory.
Dated....., 190..
Expires....., 19...

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE, UNION AGENCY,
MUSKOGEE, I. T., ..., 190..

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be.....
See my report of even date.

.....
U. S. Indian Agent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., ..., 190..

Respectfully submitted to the Secretary of the Interior, with recommendation that it be.....

.....
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., ..., 190..

.....

.....
Secretary of the Interior.

Transferable Only With Consent of the Secretary of the Interior.

For Other Minerals Than Coal, Asphalt, Oil, and Gas. .....
Mining Lease, Creek Nation.

(Sec. 17, Act of June 30, 1902, 32 Stat., 500.)

[Write All Names and Addresses in Full.]

This indenture of lease made and entered into, in quadruplicate, on this.....day of....., A. D. 190.., by and between
.....
.....
of .....
part.. of the first part, and.....
of .....
part.. of the second part, under and in pursuance of the provisions of section 17 of the act of Congress approved June 30, 1902, and ratified by the Muskogee or Creek national council on July 26, 1902, and the rules and regulations prescribed by the Secretary of the Interior relative to mining leases in the Creek Nation.

Witnesseth: That the part.. of the first part for and in consideration of the royalties, covenants, stipulations, and conditions hereinafter contained and hereby agreed to be paid, observed, and performed by the part.. of the second part, ... heirs, executors, administrators, successors, or assigns, do.. hereby demise, grant and let unto the part.. of the second part, ... heirs, executors, administrators, successors, or assigns, the following described tract of land lying and being within the Creek Nation and within the Indian Territory, to-wit: .....
.....
.....
of section....., of township....., of range....., of the Indian Meridian, and containing.....acres, more or less, for the full term of.....years from the date hereof, for the sole purpose of prospecting for and mining minerals, as follows: .....
.....
.....
the part.. of the second part to occupy so much only of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, mining, storing, and removing such minerals.

In consideration of the premises, the part.. of the second part hereby agree.. and bind....., ...heirs, executors, administrators, successors, or assigns to pay, or cause to be paid, to the part.. of the first part, as royalties, the sums of money as follows, to-wit: .....
.....
.....

And the part.. of the second part further agree.. and bind.....
.....heirs, executors, administrators, successors, or assigns, to pay,

or cause to be paid, to the lessor... as advanced annual royalty on this lease, the sums of money, as follows, to-wit: .....per acre per annum, in advance, for the first and second years; .....per acre per annum, in advance, for the third and fourth years; and .....per acre per annum, in advance, for the fifth and each succeeding year thereafter of the term for which this lease is to run; it being understood and agreed that said sums of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advanced royalty; and further, that should the part.. of the second part neglect or refuse to pay such advanced annual royalty for the period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessor.., be null and void, and all royalties paid in advance shall become the money and the property of the lessor..

All royalty accruing for any month shall be due and payable on or before the twenty-fifth day of the month succeeding.

It is agreed by the parties hereto that the land described herein shall not be held by the part.. of the second part for speculative purposes, but in good faith for mining the minerals specified; and a failure for one year by the part.. of the second part to do a reasonable amount of development work or of mining shall be held as a want of compliance with the purposes of this lease and shall render it null and void.

The part.. of the second part further agree.. and bind....., ...heirs, executors, administrators, successors, or assigns to pay, or cause to be paid, to the part.. of the first part the royalty as it becomes due.

The part.. of the second part further covenant.. and agree.. to exercise diligence in the conduct of the prospecting and mining operations, and to open mines and operate the same in a workmanlike manner and to the fullest possible extent on the leased premises; to commit no waste upon said premises, or upon the mines that may be thereon, and to suffer no waste to be committed thereon; to take good care of the same, and to surrender and return the premises at the expiration of this lease to the part.. of the first part, or to whomsoever shall be lawfully entitled thereto, in as good condition as when received, ordinary wear and tear in the proper use of the same for the purposes hereinbefore indicated and unavoidable accidents excepted, and not to remove therefrom any buildings or improvements erected thereon during said term by.....

.....

.....

the part.. of the second part, but said buildings and improvements shall remain a part of said land and become the property of the owner of the land as a part of the consideration for this lease, in addition to the other considerations herein specified, except engines, tools, boilers, boiler houses, and machinery, which shall remain the property of said part.. of the second part; that.....will not permit any nuisance to be maintained on the premises, nor allow any intoxicating liquors to be sold or given away for any purpose on the premises, and that.....will not use the premises for

any other purpose than that authorized in this lease, nor allow them to be used for any other purpose; that.....will not at any time during the term hereby granted assign, transfer, or sublet..... estate, interest, or term in said premises and land, or the appurtenances thereto, to any person or persons whomsoever without the written consent thereto of the part.. of the first part being first obtained, subject to the approval of the Secretary of the Interior.

And the said part.. of the second part further covenant.. and agree.. that.....will allow said lessor.. and his agents, from time to time, to enter upon and into all parts of said premises for purposes of inspection, and agree.. to keep an accurate account of all mining operations, showing the whole amount of mineral mined or removed, and make report thereof promptly, under oath, at the end of each month to the lessor.., and to the Secretary of the Interior through such officer as he may designate, and that all sums due as royalty shall be a lien on all implements, tools, movable machinery, and other personal chattels used in said prospecting and mining operations, and upon all the mineral obtained from the land herein leased, as security for the payment of said royalties.

And the part.. of the second part agree.. that this indenture of lease shall in all respects be subject to the rules and regulations heretofore or that may hereafter be lawfully prescribed by the Secretary of the Interior relative to such mineral leases in the Creek Nation; and said part.. of the second part expressly agree.. that should.....sublessees,.....heirs, executors, administrators, successors, or assigns violate any of the covenant-, stipulations, or provisions of this lease, or fail for the period of sixty days to pay the stipulated monthly royalty provided for herein, then the part.. of the first part shall be at liberty, in.....discretion, to avoid this indenture of lease and cause the same to be annulled, when all the rights, franchises, and privileges of the part.. of the second part, ...sublessees, executors, administrators, successors, or assigns hereunder shall cease and end without further proceedings.

If the lessee.. make.. reasonable and bona fide effort to find and mine ..... in paying quantity, as is herein required of ....., and such effort is unsuccessful, ... may at any time thereafter, with the approval of the Secretary of the Interior, surrender and wholly terminate this lease upon the full payment and performance of all ..... then existing obligations hereunder: Provided, however, That approval of such surrender by the Secretary will be required only during the time his approval of the alienation of the land is required by law.

It is further agreed and understood that this lease shall be of no force or effect unless the part.. of the second part shall, within sixty days from the date of approval of the application filed in connection herewith, furnish a satisfactory bond in accordance with the revised regulations of March 20, 1905, prescribed by the Secretary of the Interior.

In witness whereof the said parties of the first and second parts

have hereunto set their hands and affixed their seals the day and year first above written.

Witnesses: (*a*)

..... P. O..... } as to .....[SEAL.]
..... P. O.....

..... P. O..... } as to .....[SEAL.]
..... P. O.....

..... P. O..... } as to .....[SEAL.]
..... P. O.....

..... P. O..... } as to .....[SEAL.]
..... P. O.....

[Endorsed:]

Department of the Interior,
Washington, D. C.

.....Mining Lease,
Creek Nation, I. T.

.....
.....
To
.....
.....
.....
Of
.....
.....
Sec. ....., Tp. ....., Range .....
in the Creek Nation, Indian Territory.
Dated ....., 190..
Expires ..... 19...

(*a*) Two witnesses to all signatures.

DEPARTMENT OF THE INTERIOR,
U. S. INDIAN SERVICE,
UNION AGENCY,
MUSKOGEE, I. T.....190..

The within lease is forwarded to the Commissioner of Indian Affairs with recommendation that it be.....
See my report of even date.

.....
U. S. Indian Agent.

DEPARTMENT OF THE INTERIOR,
OFFICE OF INDIAN AFFAIRS,
WASHINGTON, D. C., ..., 190..

Respectfully submitted to the Secretary of the Interior with recommendation that it be .....
.....
.....
Commissioner.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C., ..., 190..

.....
.....
Secretary of the Interior.

Bond.

Know all men by these presents, that .....
.....
of .....
as surety..., and .....
.....
.....
of .....
as surety..., are held and firmly bound unto the United States of America in the sum of ..... dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our heirs, successors, executors, or administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated ..... day of .....

The condition of this obligation is such that whereas the above bounden .....
.....
.....
as principal..., entered into .....certain indenture of lease, dated ....., with .....
.....
for the lease of a tract of land described as follows:.....
.....
.....
and located in the Creek Nation, Indian Territory, for..... purposes for the period of ..... years from the date thereof.

Now, if the above-bounden .....
.....
.....
.....
shall faithfully carry out and observe all the obligations assumed in said indenture of lease by ..... and shall observe all the laws of the United States, and regulations made, or which shall be made thereunder, for the government of trade and intercourse with Indian tribes, and all the rules and regulations that have been, or may be, prescribed by the Secretary of the Interior under Section 17 of the act approved June 30, 1902 (32 Stat. L., 500), relative to leases in the Creek Nation, Indian Territory, then this obligation shall be null and void; otherwise to remain in full force and effect.

Signed and sealed in the presence of—

Witnesses: (*a*)

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

.....
P. O.....
.....
P. O.....
} as to .....[SEAL.]

[Endorsed:]

Department of the Interior.
Washington, D. C.

Bond
of

.....
.....
.....
.....
Lessee.. of .....
.....
.....
in the Creek Nation, Indian Territory, for ..... purposes, dated ....., 190..

(*a*) Two witnesses to all signatures.

DEPARTMENT OF THE INTERIOR,
WASHINGTON, D. C.,....., 190..

Approved:

.....
Secretary.

Affidavit of Surety.

(To be used only when individual sureties are offered.)

..... } ss:
..... }

I, ..., one of the sureties on the prefixed bond of ..... as ....., depose and say that I am worth in unincumbered property, over and above my debts, liabilities and exemptions under the laws of the ..... of ..... dollars and upward, as follows:

Real estate, valued at .....dollars, situate in ....., and consisting of (*a*)
.....
.....
.....
.....; and

Personal estate, valued at ..... dollars, located in ....., and consisting of (*b*)
.....
.....
.....

(Signature) .....
(Post-office address).....

Subscribed and sworn to before me this .....day of.....
[SEAL.]

.....
.....

..... } ss:
..... }

I, ..., do hereby certify that ....., who administered the above oath, was, at the time of doing so, a .....in and for said ....., duly qualified to act as such, and to administer oaths in such cases, and that I believe his signature, as above written, is genuine.

---

a Here state whether city property, improved or unimproved, farm, or unimproved land. Property must be described by street numbers, lot numbers, or section, township, and range numbers.

b Here describe the nature of the property, whether notes, bonds, stock, merchandise, etc. State also, as nearly as practicable, the present market value.

In testimony whereof I have hereunto set my hand and affixed the seal of ..... this ..... day of ....., one thousand nine hundred and .....

.....

.....

[Endorsed:] Filed July 24, 1909. John D. Jordan, Clerk.

(Petition of D. A. McDougal for a Rehearing in Cause No. 2901.)

And on the eighteenth day of August, A. D. 1909, the petition of D. A. McDougal for a Rehearing was filed in cause No. 2901, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, in and for the Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al., Appellees.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervenor, Appellant,
vs.
ALBERT W. SHULTHIS et al., Appellees.

Petition of D. A. McDougal for Rehearing.

Comes now D. A. McDougal, by his solicitor, and moves the Court for a rehearing of this cause, because he says that the Court erred in its opinion and judgment, wherein it held that the estate taken by Andrew J. Berryhill in the lands of the Creek Indians under allotment was an estate of inheritance, as contradistinguished from a new acquisition, and he respectfully submits in support thereof the following:

Perhaps the first matter to be considered in determining whether or not the land of an allottee of the Five Civilized Tribes is an ancestral estate or a new acquisition, is in the nature and character of the title before and after allotment. What is the nature, extent and character of the tribal titles held by members of the Five Civilized Tribes? Is the title to the tribal lands in the tribe in its public capacity, or in the individual members of the tribe? Considering this question, the Supreme Court of the United States, in Stephens v. Cherokee Nation, 174 U. S., at 488, uses the following language:

"The lands and moneys of these tribes are public lands and public moneys, and are not held in individual ownership, and the assertion by any particular applicant that his right therein is so vested

as to preclude inquiry into his status, involves a contradiction of terms."

That language is quoted with approval by this Court in the case of Wallace v. Adams, 143 Fed. 726.

In the case of Ligon *et al.*, v. Johnson *et al.*, 164 Fed. 670, Judge Hook, speaking for this Court, uses the following language:

"We find nothing in the history of the Choctaws, their relations to the Government, and the negotiations leading to their removal west of the Mississippi River that can afford a reason for such a radical departure from the course pursued with other tribes under like circumstances; nor do we think that the words of the treaty and the grant in question are so dissimilar from those employed in other cases as to indicate a different purpose. That the lands involved were public lands belonging to the Choctaw and Chickasaw Nations, and not to the individual members, has been assumed without contradiction from the inception of their titles through a long sequence of acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is so only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people. Until specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justifiable in the courts. The disposition of the tribal property falls within the legislative domain, the power of Congress is supreme and its action is conclusive upon the courts."

If the declaration of this Court in the case of Ligon *et al.*, v Johnson *et al.*, is the correct statement of the nature and character of the tribal titles, and in this particular it seems to be fully supported by the decision of the Supreme Court of the United States in Stephens v. Cherokee Nation, 174 U. S. 445, then there is a very close analogy between lands patented by the United States to a settler on the public domain and to an allottee of either of the tribes. Prior to allotment, the individual members of either one of the Five Civilized Tribes simply had a right to reduce to possession, to hold and cultivate certain limited portions of the tribal domain. Upon his death, his interest in the property ceased. It did not pass to his heirs. Nothing passed by inheritance, except the mere right of occupancy and of possession of improvements located upon the public domain. The ultimate fee was in the United States, the base or qualified fee in the Tribes.

The Government of the United States and the Creek Tribe of Indians made an agreement, by the terms of which the Creek Nation was to convey to its members the fee simple in and to certain tracts and parcels of land to be thereafter selected, and the United States, in consideration of such selection and acceptance thereof by the members of said tribe, relinquished and granted by the terms of the treaty whatever right or possibility of reversion then existed in the United States. Every member of the tribe living, upon a given date, received an allotment, without regard to whether or not his ancestors were still living, or whether he had descendants who were

likewise entitled to receive allotments. Each member took by patent executed by the Government or the principal chief of the tribe and approved by the Secretary of the Interior.

In other words, the estate of a member of the tribe before allotment was merely that of occupancy, ceasing upon his death and subject to be destroyed by the happening of a condition subsequent. The estate secured by an allottee is an absolute fee simple title in which there is concentrated the right of occupancy, the tribal title, and the possibility of a reversion in favor of the United States.

This statute was imported from Arkansas and made applicable to the persons and estates of the Indians and freedmen of the Five Civilized Tribes, on the 28th day of April, 1904. If this statute had an established construction given to it by the courts of Arkansas prior to its adoption, then it is conclusively presumed to have been adopted with a view to such construction. This statute first came before the Supreme Court of Arkansas for its consideration in the case of Kelly's Heirs v. Maguire, 15 Arkansas 555. At page 587, the Supreme Court of Arkansas lays down the rule by which thereafter it is to be determined whether an estate is ancestral or a new acquisition. The language of the Court is as follows:

"It must be understood, however, that a new acquisition in the sense intended by the statute is one which the intestate has acquired by his exertions and industry (Brewster v. Benedict, 14 Ohio 385), or by will or deed from a stranger. In other words, it is an estate derived from any source other than descent, devise, or gift, from father or mother, or any relative in the paternal or maternal line."

Magness v. Arnold, 31 Ark. 103;
Scull v. Eaugine, *et al.*, 15 Ark. 695;
Hogan *et al.*, v. Finley *et ux.*, 11 S. W. 1035;
Wheelock v. Simons, 86 S. W. 830;
Am. & Eng. Enc. of Law, Vol. 27, pp. 299-300.

Your orator further shows that the question involved affects the title to all of the lands of the Five Civilized Tribes of Indians, and he requests that because of its importance he be permitted, through his attorney, to orally argue this question before this Honorable Court. Wherefore, he prays that a rehearing be granted him in this cause.

Respectfully submitted,

S. T. BLEDSOE,
Counsel for said McDougal, Appellee.

I, S. T. Bledsoe, counsel for D. A. McDougal, appellee, do hereby certify that, in my judgment, the foregoing petition for rehearing is well founded, and that the same is not interposed for delay.

S. T. BLEDSOE,
Counsel for D. A. McDougal, Appellee.

(Endorsed:) Filed Aug. 18, 1909. John D. Jordan, Clerk.

(*Stipulation for Stay of Mandate.*)

And on the twenty-sixth day of August, A. D. 1909, a stipulation for stay of mandate was filed in said causes Nos. 2901 and 2905, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals in and for the Eighth Circuit.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al., Appellees.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Appellant,
vs.
ALBERT W. SHULTHIS et al., Appellees.

Stipulation.

Come now all the parties hereto, by their solicitors of record, and stipulate and agree that all proceedings herein, including the issuing of the mandate, be stayed for a period of Forty days from and after the denial of the petition for rehearing filed herein by Albert W. Shulthis, to allow the said Albert W. Shulthis and the said George Franklin Berryhill time in which to take and perfect an appeal herein to the Supreme Court of the United States.

GEO. S. RAMSEY AND
PRESTON C. WEST,
Solicitors for D. A. McDougal, Perry McKay, Edmond McKay and Kiefer Oil & Gas Company.
S. V. O'HARE &
F. L. McCAIN,
Solicitors for George Franklin Berryhill.
C. L. THOMAS AND
EDGAR A. DE MEULES
Solicitors for Albert W. Shulthis.

(Endorsed:) No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal et al., Appellees. No. 2905. George Franklin Berryhill, Appellant, vs. Albert W. Shulthis, et al., Appellees. Stipulation for stay of Mandate. Filed Aug. 26, 1909. John D. Jordan, Clerk.

(*Order Denying Petitions for Rehearing.*)

And on the sixteenth day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petitions for rehearing in said causes Nos. 2901 and 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909.

THURSDAY, *September* 16, 1909.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. McDOUGAL et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

These causes came on this day to be heard upon the petitions for a rehearing, filed by counsel for Albert W. Shulthis and D. A. McDougal.

On Consideration Whereof, it is now here ordered by this Court, that said petitions for a rehearing of these causes, be, and the same are each hereby, denied.

September 16, 1909.

(*Petition for Appeal to the Supreme Court of the United States in Cause No.* 2901.)

And on the twenty-fifth day of October, A. D. 1909, a petition for an appeal to the Supreme Court of the United States was filed in cause No. 2901, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit.

No. 2901. In Equity.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. McDOUGAL, EDWIN McKAY, PERRY McKAY and THE KEIFER Oil & Gas Company, Appellees; George Franklin Berryhill, Intervener.

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Judicial Circuit:

The above named appellant, Albert W. Shulthis, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause, on the 3rd day of June, A. D. 1909, does hereby appeal from the said order and decree of June 3, 1909, to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and that a transcript of the record, proceedings and papers upon which said order and decree was based, duly authenticated may be sent to the Supreme Court of the United States; and desiring to supersede the execution of the said order and decree your petitioner herewith tenders bond in such amount as the Court may require for such purpose and prays that the allowance of the appeal supersedeas be issued.

C. L. THOMAS,
EDGAR A. DE MEULES,
Solicitors and of Counsel for Appellant,
Albert W. Shulthis.

(Endorsed:) In the United States Circuit Court of Appeals, Eighth Judicial Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, Edmond McKay, Perry McKay and the Keifer Oil & Gas Company, Appellees, George Franklin Berryhill, Intervener. Petition for Appeal. Filed Oct. 25, 1909, John D. Jordan, Clerk.

(*Assignment of Errors on Appeal to the Supreme Court of the United States in Cause No.* 2901.)

And on the twenty-fifth day of October, A. D. 1909, an assignment of errors on appeal to the Supreme Court of the United States was filed in cause No. 2901, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit.

No. 2901. In Equity.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. McDOUGAL, EDWIN McKAY, PERRY McKAY and THE KEIFER Oil & Gas Company, Appellees; George Franklin Berryhill, Intervener.

Assignment of Errors.

Now on this 25th day of October, A. D. 1909, comes the appellant, Albert W. Shulthis, by his solicitors, C. L. Thomas and Edgar A. de Meules, and says that the order and decree entered in the above cause on the 3rd day of June, A. D. 1909, is erroneous and unjust, and files the following assignments of errors upon which he will rely upon his prosecution of his appeal from the order and decree made by this Honorable Court on the said 3rd day of June, A. D. 1909, in the above entitled cause:

First. The United States Circuit Court of Appeals for the Eighth Judicial Circuit erred in dismissing the bill of complaint filed by the appellant, Albert W. Shulthis.

Second. The court erred in not entering a decree in this cause adjudging the rights and liabilities of all parties as prayed in the bill of complaint filed by the said Albert W. Shulthis.

Third. The court erred in failing and refusing to hold and adjudge the complainant to have by virtue of the lease executed and delivered to him by George Franklin Berryhill on March 24, 1906, as shown by the record, the sole and exclusive right as lessee to all and singular the oil and natural gas deposits in and under the tract of land in controversy, with the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas, and to use so much of the surface of said land as may be reasonably necessary to carry on the working, prospecting for, extracting, piping, storing, refining and removing such oil and natural gas including also the right to obtain from wells or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas for fuel so far as it is necessary to the prosecution of said operations and generally to have all things secured to him under and by virtue of said lease.

Fourth. The court erred in not holding and adjudging that the appellees, and each of them, have no interest, estate or property in or to the deposits of oil and gas in and under the lands in controversy.

Fifth. The court erred in failing and refusing to enjoin and restrain the defendants, and each of them, from prospecting upon or drilling the lands in controversy for oil or natural gas, or from extracting any oil or gas from said lands, and from asserting any

interest in or to said lands adverse and hostile to the interest and title of the complainant, Albert W. Shulthis.

Sixth. The court erred in failing and refusing to hold and adjudge the oil and gas mining lease executed and delivered on the 24th day of March, 1906, by George Franklin Berryhill and Clementine Berryhill, lessors, and Albert W. Shulthis, lessee, covering the lands in controversy, to be superior and prior in its operation and effect to the oil and gas mining lease executed and delivered on the 12th day of October, 1906, by Edmond McKay, Perry McKay, Florence McKay and Gusta McKay, lessors, and Arthur B. Reese, lessee.

Seventh. The court erred in failing and refusing to hold and adjudge the oil and gas mining lease executed and delivered on the 24th day of March, A. D. 1906, by George Franklin Berryhill to appellant, Albert W. Shulthis, covering the lands in controversy, to be superior to and prior in its operation and effect to the warranty deed covering the lands in controversy, executed and delivered by George Franklin Berryhill to appellees, Perry McKay and Edmond McKay, on the 5th day of June, A. D. 1906.

Eighth. The court erred in holding and adjudging the warranty deed to the lands in controversy executed and delivered to appellees, Perry McKay and Edmond McKay, on the 5th day of June, A. D. 1906, by George Franklin Berryhill to be superior to and prior in its operation and effect to the oil and gas mining lease executed and delivered on the 24th day of March, A. D. 1906 by George Franklin Berryhill to appellant, Albert W. Shulthis, covering the lands in controversy.

Ninth. The court erred in holding and adjudging that the oil and gas mining lease executed and delivered by George Franklin Berryhill to appellant, Albert W. Shulthis, on March 24th, 1906, approved by the Secretary of the Interior on April 21, 1907, covering the lands in controversy, was subject to the registration laws of Arkansas, being Chapter 27 of Mansfield's Digest of the Laws of Arkansas, put into force in the Indian Territory by Act of Congress of February 19, 1903 (32 Stat. at Large 841).

Tenth. The court erred in holding and adjudging that the appellees, Edmond McKay and Perry McKay, did not take the title to the land in controversy by virtue of the warranty deed executed and delivered to them by George Franklin Berryhill on the 5th day of June, A. D. 1906, subject to the oil and gas mining lease executed and delivered to Albert W. Shulthis, the appellant, by George Franklin Berryhill on the 24th day of March, A. D. 1906.

Eleventh. The court erred in ordering and adjudging that the costs of this suit be taxed against the appellant, Albert W. Shulthis.

Wherefore, the appellant, Albert W. Shulthis, prays that the said order and decree entered in the above entitled cause on the 3rd day of June, A. D. 1909 be reversed that the Supreme Court of the United States render a proper decree on the record.

C. L. THOMAS,
EDGAR A. DE MEULES,
Solicitors for Appellant, Albert W. Shulthis.

(Endorsed:) In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, Edmond McKay, Perry McKay, and the Keifer Oil & Gas Company, Appellees, George Frankling Berryhill, Intervenor. Assignment of Errors. Filed Oct. 25, 1909, John D. Jordan, Clerk.

(Bond on Appeal to the Supreme Court of the United States in Cause No. 2901.)

And on the twenty-fifth day of October, A. D. 1909, a bond on appeal to the Supreme Court of the United States was filed in cause No. 2901, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

No. 2901. In Equity.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KEIFER Oil & Gas Company, a Corporation, Appellees; George Franklin Berryhill, Intervenor.

Bond on Appeal.

Know all men by these presents:

That we, Albert W. Shulthis, as principal, and *and* National Surety Company, as sure*ties*, are held and firmly bound unto D. A. McDougal, Edmond McKay, Perry McKay, the Keifer Oil & Gas Company, and George Franklin Berryhill, appellees, in the sum of twenty five thousand Dollars ($25000.00) lawful money of the United States of America, to the payment of which well and truly to be made, the said principal, and the said sureties, bind themselves, their heirs, and assigns, jointly and severally, firmly by these presents.

Signed on this the 22 day of October, A. D. 1909.

Whereas, on the 3rd day of June, A. D. 1909, in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in a suit pending in that court, wherein Albert W. Shulthis was appellant and D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Company, and George Franklin Berryhill were appellees, numbered in the Equity Docket No. 2901, an order and decree was rendered against the said Albert W. Shulthis, and the said Albert W. Shulthis having obtained an appeal to the Supreme Court of the United States and filed a copy thereof in the office of the clerk of the said United States Circuit Court of Appeals for the Eighth Judicial Circuit to reverse said order and decree and a citation directed to the said D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Company, and George Franklin Berryhill,

citing and admonishing them to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof;

Now, the condition of this obligation is such that if the said Albert W. Shulthis shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

ALBERT W. SHULTHIS,
Principal.

[SEAL.] NATIONAL SURETY COMPANY,
By W. M. BYRNE,
Resident Vice-President.

Attest:

JOHN H. DAVIS,
Resident Assistant Secretary,
Sureties.

Approved on this the 25th day of October, A. D. 1909.

WALTER H. SANBORN,
United States Circuit Judge for the
Eighth Judicial Circuit.

(Endorsed:) In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Co., a corporation, Appellees, George Franklin Berryhill, Intervenor. Appeal Bond. Filed Oct. 25, 1909, John D. Jordan, Clerk.

(*Order Allowing Appeal to the Supreme Court of the United States in Cause No.* 2901.)

And on the twenty-fifth day of October, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order allowing an appeal to the Supreme Court of the United States in cause No. 2901, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909.

MONDAY, *October* 25, 1909.

No. 2901.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Upon consideration of the petition of appellant, it is ordered that an appeal to the Supreme Court of the United States from the final

decree heretofore filed and entered herein be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and of the proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Twenty Five Thousand ($25000.00) Dollars, the same to act as a supersedeas and also as bond for costs and damages on appeal.

October 25, 1909.

(*Citation on Appeal in Cause No.* 2901.)

And on the eighth day of November, A. D. 1909, the citation on appeal to the Supreme Court of the United States was filed in cause No. 2901, the original of which with the acceptance of service by counsel for appellees endorsed thereon, is hereto attached and herewith returned:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

No. 2901. In Equity.

ALBERT W. SHULTHIS, Appellant,
vs.
D. A. MCDOUGAL, EDMOND MCKAY, PERRY MCKAY, THE KEIFER Oil & Gas Company, a Corporation, Appellees; George Franklin Berryhill, Intervenor.

Citation on Appeal.

To D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Company, a Corporation, and George Franklin Berryhill, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington in the District of Columbia, thirty days from and after the day this citation bears date pursuant to an appeal allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit at the city of St Louis, State of Missouri, wherein Albert Shulthis is appellant and you are appellees to show cause, if any there be, why the order, decree and judgment against the said Albert W. Shulthis, appellant, as in said order and decree mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 25th day of October, A. D. 1909, in the year of our Lord, nineteen hundred and nine.

WALTER H. SANBORN,
United States Circuit Judge for the Eighth Judicial Circuit.

We, the undersigned attorneys of record in the above entitled cause for the appellees, D. A. McDougal, Perry McKay, Edmond McKay, and The Keifer Oil & Gas Company, and for the intervenor, George Franklin Berryhill, hereby accept service of the foregoing citation on this the 1st day of November, A. D. 1909.

PRESTON C. WEST,
GEO. S. RAMSEY,
Solicitors for Appellees.
L. L. McCAIN,
S. V. O'HARE,
Solicitors for Intervenor.

[Endorsed:] In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2901. Albert W. Shulthis, Appellant, vs. D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Company, a corporation, Appellees; George Franklin Berryhill, Intervenor. Citation on Appeal. Filed Nov. 8, 1909. John D. Jordan, Clerk.

(*Appearance of Mr. S. V. O'Hare and Mr. Farrar L. McCain as Counsel for Appellant in Cause No.* 2905.)

And on the fourteenth day of July, A. D. 1908, the appearance of Mr. S. V. O'Hare and Mr. Farrar L. McCain, as counsel for appellant was filed in cause No. 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al.

The Clerk will enter *my* appearance as Counsel for the Appellant.

S. V. O'HARE AND
FARRAR L. McCAIN.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2905. George Franklin Berryhill, Intervener, Appellant, vs. Albert W. Shulthis, et al. Appearance. Filed Jul- 14, 1908. John D. Jordan, Clerk. S. V. O'Hare, Farrar L. McCain, Counsel for Appellant.

(*Appearance of Mr. C. L. Thomas and Mr. Edgar A. De Meules as Counsel for Appellees in Cause No.* 2905.)

And on the second day of September, A. D. 1908, the appearance of Mr. C. L. Thomas and Mr. Edgar A. De Meules, as counsel for the appellees was filed in cause No. 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al.

The Clerk will enter *my* appearance as Counsel for the Appellees.
C. L. THOMAS.
EDGAR A. DE MEULES.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2905. George Franklin Berryhill, Intervener, Appellant, vs. Albert W. Shulthis, et al. Appearance. Filed Sep. 2, 1908, John D. Jordan, Clerk. C. L. Thomas, Edgar A. De Meules, Counsel for Appellees.

(*Appearance of Mr. George S. Ramsey as Counsel for Appellees in Cause No.* 2905.)

And on the second day of September, A D. 1908, the appearance of Mr. George S. Ramsey, as counsel for the appellees was filed in cause No. 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al.

The Clerk will enter my appearance as Counsel for the Appellees.
GEO. S. RAMSEY.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2905. George Franklin Berryhill, Intervener, Appellant, vs. Albert W. Shulthis, et al. Appearance. Filed Sep. 2, 1908, John D. Jordan, Clerk. George S. Ramsey, Counsel for Appellees.

(*Appearance of Mr. Preston C. West as Counsel for Appellees in Cause No.* 2905.)

And on the second day of September, A. D. 1908, the appearance of Mr. Preston C. West, as counsel for the appellees was filed in cause No. 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al.

The Clerk will enter my appearance as Counsel for the Appellees.
PRESTON C. WEST.

(Endorsed:) U. S. Circuit Court of Appeals, Eighth Circuit. No. 2905. George Franklin Berryhill, Intervener, Appellant, vs. Albert W. Shulthis, et al. Appearance. Filed Sep. 2, 1908. John D. Jordan, Clerk. Preston C. West, Counsel for Appellees.

(*Order of Submission in Cause No.* 2905.)

And on the thirteenth day of January, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order of submission in cause No. 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, December Term, 1908.

WEDNESDAY, *January* 13, 1909.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Appellant,
vs.
ALBERT W. SHULTHIS et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause having been called for hearing in its regular order, the same was argued by Mr. S. V. O'Hare in behalf of the appellant and by Mr. George S. Ramsey for the appellees.

Thereupon this cause was submitted to the Court upon the transcript of record from said Circuit Court and the briefs of counsel filed herein.

(*Opinion.*)

And on the third day of June, A. D. 1909, the opinion of said United States Circuit Court of Appeals was filed in said causes Nos. 2901 and 2905, which said opinion is omitted at this point for the reason that the same appears in full at page 292 of this transcript.

(*Decree in Cause No.* 2905.)

And on the third day of June, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals, is a decree in cause No. 2905, in the words and figures following, to-wit:

United States Circuit Court of Appeals, Eighth Circuit, May Term, 1909.

THURSDAY, *June* 3, 1909.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS, D. A. MCDOUGAL, EDMOND MCKAY, PERRY MCKAY, and THE KIEFER OIL AND GAS COMPANY.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Eastern District of Oklahoma, and was argued by counsel.

On Consideration Whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said Circuit Court, in this cause, be, and the same is hereby, affirmed with costs; and that Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company have and recover against George Franklin Berryhill, Intervener, the sum of twenty dollars for their costs herein and have execution therefor.

June 3, 1909.

(*Petition of Albert W. Shulthis for a Rehearing in Cause No.* 2905.)

And on the twenty-fourth day of July, A. D. 1909, a petition by Albert W. Shulthis for a rehearing was filed in cause No. 2905, which said petition for a rehearing is omitted at this point for the reason that the same appears in full at page 305 of this transcript.

(*Petition of D. A. McDougal for a Rehearing in Cause No. 2905.*)

And on the eighteenth day of August, A. D. 1909, a petition by D. A. McDougal for a rehearing was filed in cause No. 2905, which said petition for a rehearing is omitted at this point for the reason that the same appears in full at page 372 of this transcript.

(*Stipulation for Stay of Mandate.*)

And on the twenty-sixth day of August, A. D. 1909, a stipulation for stay of mandate was filed in said causes Nos. 2901 and 2905, which said stipulation is omitted at this point for the reason that the same appears in full at page 378 of this transcript.

(*Order Denying Petitions for Rehearing.*)

And on the sixteenth day of September, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order denying the petitions for rehearing in said causes Nos. 2901 and 2905, which said order is omitted at this point for the reason that the same appears in full at page 379 of this transcript.

(*Petition for Appeal to Supreme Court of the United States in Cause No. 2905.*)

And on the twenty-fifth day of October, A. D. 1909, a petition for an appeal to the Supreme Court of the United States was filed in cause No. 2905, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals, Eighth Judicial Circuit.

No. 2905. In Equity.

GEORGE FRANKLIN BERRYHILL, Appellant,
vs.
ALBERT W. SHULTHIS, D. A. MCDOUGAL, EDWIN MCKAY, PERRY MCKAY, and THE KEIFER OIL & GAS COMPANY, Appellees.

To the Honorable Judges of the United States Circuit Court of Appeals, Eighth Judicial Circuit:

The above named appellant, George Franklin Berryhill, conceiving himself aggrieved by the order and decree made and entered in the above entitled cause, on the 3rd day of June, A. D. 1909, does hereby appeal from the said order and decree of June 3, 1909, to the Supreme Court of the United States, for the reasons specified in the assignment of errors which is filed herewith, and he prays that his appeal be allowed and that citation issue as provided by law and

that a transcript of the record, proceedings and papers upon which said order and decree was based, duly authenticated may be sent to the Supreme Court of the United States; and desiring to supersede the execution of the said order and decree your petitioner herewith tenders bond in such amount as the Court may require for such purpose and prays that the allowance of the appeal supersedeas be issued.

S. V. O'HARE,
FARRAR L. McCAIN,
Solicitors and of Counsel for Appellant,
George Franklin Berryhill.

(Endorsed:) In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2905. George Franklin Berryhill, Appellant, vs. Albert W. Shulthis, D. A. McDougal, Edwin McKay, Perry McKay, and the Keifer Oil & Gas Company, Appellees. Petition for Appeal. Filed Oct. 25, 1909, John D. Jordan, Clerk.

(*Assignment of Errors in Cause No.* 2905.)

And on the twenty-fifth day of October, A. D. 1909, an assignment of errors on appeal to the Supreme Court of the United States was filed in cause No. 2905, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Circuit.

No. 2905. In Equity.

GEORGE FRANKLIN BERRYHILL, Appellant,
vs.
ALBERT W. SHULTHIS —, Appellees.

Assignment of Errors.

And now comes the appellant, George Franklin Berryhill, by his attorneys, S. V. O'Hare and F. L. McCain, and says that the decree entered in the above cause on the 3rd day of June, A. D. 1909 is erroneous and unjust for the following reasons as shown by the assignment of errors here set out, to-wit:

First. The court erred in dismissing the bill filed by the appellant, George Franklin Berryhill.

Second. The court erred in not entering a decree in the cause adjudging the rights and liabilities of all the parties hereto to be as praved in the bill filed by the appellant, George Franklin Berryhill.

Third. The court erred in failing and refusing to hold and adjudge the defendants to have no interest or estate whatsoever in the land in controversy or any part thereof.

Fourth. The court erred in failing and refusing to hold and adjudge that the appellant, George Franklin Berryhill, is seized of a good and valid estate in fee in the lands in controversy, subject only

to the oil and gas mining lease upon said lands, executed and delivered by the intervenor and Clementine Berryhill to the complainant on the 24th day of March, 1906, as shown by the record.

Fifth. The court erred in failing and refusing to hold and adjudge that the receiver appointed in this cause pay to the intervenor a sum equal to ten per cent of the value of all crude oil extracted by him from the lands in controversy.

Sixth. The court erred in failing and refusing to hold and adjudge that the defendant, Keifer Oil and Gas Company pay to the appellant, George Franklin Berryhill, a sum equal to ten per cent of the value of all crude oil extracted from the lands in controversy, by the said Keifer Oil and Gas Company.

Seven. The court erred in failing and refusing to hold and adjudge that the defendants and each of them, have no interest, estate or property in or to the deposits of oil and gas in and under the lands in controversy.

Eight. The court erred in holding and adjudging that the term "inherited lands" as applied to the Creek Nation, applies to all allotments selected by or for deceased members of the tribe in the hands of their heirs whether said deceased members died before or after such allotment.

Nine. The court erred in holding and adjudging that the warranty deed, as shown by the record, executed on the 5th day of June, 1906, by the appellant and Clementine Berryhill his wife, to Edmond McKay and Perry McKay was the valid deed of the grantors therein.

Ten. The court erred in failing and refusing to hold and adjudge that the warranty deed, as shown by the record, executed on the 5th day of June, 1906, by the appellant, George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, to Edmond McKay and Perry McKay, covering the lands in controversy was void and that no interest passed thereby.

Eleven. The court erred in holding and adjudging that the restrictions on the alienation of the land in controversy were removed by the provisions of section 22 of an Act of Congress approved April 26, 1906, entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

Twelve. The court erred in failing and refusing to hold and adjudge that at the time of the execution of the warrantay deed by the appellant, George Franklin Berryhill and Clementine Berryhill his wife, to Edmond McKay and Perry McKay, on June 5th, 1906, as shown by the record, that the said George Franklin Berryhill and Clementine Berryhill had no legal capacity to convey the land in controversy.

Thirteen. The court erred in failing and refusing to hold and adjudge that the warranty deed, as shown by the record executed on the 5th day of June, 1906, by the appellant, George Franklin Berryhill and Clementine Berryhill to Edmond McKay and Perry McKay, was void and that no interest passed thereby.

Fourteen. The court erred in holding and adjudging that section No. 2531 of Mansfield's Digest of the Statutes of the

State of Arkansas, governed the amount, quantity, quality and the manner of taking of the estate in the lands in controversy, that became vested in George Franklin Berryhill under and by virtue of the patents issued to the "heirs of Andrew J. Berryhill, deceased," by the United States and the Creek Nation, as shown by the record.

Fifteen. The court erred in failing and refusing to hold and adjudge that under and by virtue of section 2522 of Mansfield's Digest of the Statutes of Arkansas, George Franklin Berryhill as the father of Andrew J. Berryhill, deceased, was seized of an estate in fee simple in the lands in controversy under and by virtue of the patents, as shown by the record, issued to "the heirs of Andrew J. Berryhill, deceased," by the United States and the Creek Nation.

Sixteen. The court erred in holding and adjudging that the lands in controversy are to be treated in the hands of the deceased Andrew J. Berryhill as an estate of inheritance from his parents.

Seventeen. The court erred in holding and adjudging that the lands in controversy came to Andrew J. Berryhill by the blood of George Franklin Berryhill.

Eighteen. The court erred in holding and adjudging that the lands in controversy are to be taken as though they had come to the "heirs of Andrew J. Berryhill, deceased," by descent.

Nineteen. The court erred in failing and refusing to hold and adjudge that the lands in controversy were allotted by the United States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased."

Twenty. The court erred in failing and refusing to declare null and void as clouds upon the title of this appellant to the lands in controversy various leases and conveyances, as shown by the record, under which the defendants and each of them claimed.

Twenty-one. The court erred in ordering and adjudging that the costs in this suit be taxed against the appellant, George Franklin Berryhill.

Twenty-second. The court erred in dismissing and discharging the receiver heretofore appointed in this cause.

Wherefore, the appellant, George Franklin Berryhill, prays that the said order and decree be reversed and that the Supreme Court of the United States render a proper decree upon the record.

S. V. O'HARE,
FARRAR L. McCAIN,
Solicitors and of Counsel for Appellant,
George Franklin Berryhill.

(Endorsed:) In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2905. George Franklin Berryhill, Appellant, vs. Albert W. Shulthis, et al., Appellees. Assignment of Errors. Filed Oct. 25, 1909. John D. Jordan, Clerk.

(*Bond on Appeal to the Supreme Court of the United States in Cause No. 2905.*)

And on the twenty-fifth day of October, A. D. 1909, a bond on appeal to the Supreme Court of the United States was filed in cause No. 2905, in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

No. 2905. In Equity.

GEORGE FRANKLIN BERRYHILL, Appellant,
vs.
ALBERT W. SHULTHIS, D. A. MCDOUGAL, EDMOND MCKAY, PERRY McKay, The Keifer Oil & Gas Company, a Corporation, Appellees.

Bond on Appeal.

Know all men by these presents: That we, George Franklin Berryhill, as principal, and National Surety Company, as sure*ties*, are held and firmly bound unto Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay, and the Keifer Oil & Gas Company, appellees, in the sum of twenty five thousand Dollars ($25000.00) lawful money of the United States of America, to the payment of which well and truly to be made, the said principal, and the said sureties, bind themselves, their heirs, and assigns, jointly and severally, firmly by these presents.

Signed on this the 22nd day of October, A. D. 1909.

Whereas, on the 3rd day of June, A. D. 1909, in the United States Circuit Court of Appeals for the Eighth Judicial Circuit, in a suit pending in that court, wherein George Franklin Berryhill was appellant and D. A. McDougal, Edmond McKay, Perry McKay, the Keifer Oil & Gas Company, and Albert W. Shulthis were appellees, numbered in the Equity Docket No. 2905, an order and decree was rendered against the said George Franklin Berryhill, and the said George Franklin Berryhill having obtained an appeal to the Supreme Court of the United States and filed a copy thereof in the office of the clerk of the said United States Circuit Court of Appeals for the Eighth Judicial Circuit to reverse said order and decree and a citation directed to the said Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay, and the Keifer Oil & Gas Company, citing and admonishing them to be and appear at the Supreme Court of the United States at Washington within thirty days from the date thereof;

Now, the condition of this obligation is such that if the said George Franklin Berryhill shall prosecute his appeal to effect and answer all

damages and costs if he fails to make his plea good, then the above obligation to be void, else to remain in full force and virtue.

GEORGE FRANKLIN BERRYHILL,
Principal.

[SEAL.] NATIONAL SURETY COMPANY,
By W. M. BYRNE, *Resident Vice-President,*

Attest:

JOHN H. DAVIS,
Resident Assistant Secretary,
Sureties.

Approved on this the 25th day of October, A. D. 1909.

WALTER H. SANBORN,
United States Circuit Judge for the Eighth Judicial Circuit.

(Endorsed:) In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2905. George Franklin Berryhill, Appellant, vs. Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Company, a corporation, Appellees. Appeal Bond. Filed Oct. 25, 1909, John D. Jordan, Clerk.

(*Order Allowing Appeal to the Supreme Court of the United States in Cause No.* 2905.)

And on the twenty-fifth day of October, A. D. 1909, in the record of the proceedings of said Circuit Court of Appeals is an order allowing an appeal to the Supreme Court of the United States in cause No. 2905, in the words and figures following to-wit:

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1909.

MONDAY, *October* 25, 1909.

No. 2905.

GEORGE FRANKLIN BERRYHILL, Intervener, Appellant,
vs.
ALBERT W. SHULTHIS et al.

Appeal from the Circuit Court of the United States for the Eastern District of Oklahoma.

Upon consideration of the petition of appellant, it is ordered that an appeal to the Supreme Court of the United States from the final decree heretofore filed and entered herein be, and the same is hereby, allowed, and that a certified transcript of the record, testimony, exhibits, stipulations and of the proceedings herein be forthwith transmitted to said Supreme Court of the United States.

It is further ordered that the bond on appeal be fixed at the sum of Twenty Five Thousand ($25000.00) Dollars, the same to act as a supersedeas and also as a bond for costs and damages on appeal.

October 25, 1909.

(*Citation on Appeal in Cause No.* 2905.)

And on the eighth day of November, A. D. 1909, the citation on appeal to the Supreme Court of the United States was filed in cause No. 2905, the original of which with the acceptance of service by counsel for appellees endorsed thereon, is hereto attached and herewith returned:

In the United States Circuit Court of Appeals for the Eighth Judicial Circuit.

No. 2905. In Equity.

GEORGE FRANKLIN BERRYHILL, Appellant,

vs.

ALBERT W. SHULTHIS, D. A. MCDOUGAL, EDMOND MCKAY, PERRY McKay, The Keifer Oil & Gas Company, a Corporation, Appellees.

Citation on Appeal.

To Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay, and The Keifer Oil & Gas Company, a Corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held in the city of Washington in the District of Columbia, thirty days from and after the day this citation bears date pursuant to an appeal allowed and filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Judicial Circuit at the City of St. Louis, State of Missouri, wherein George Franklin Berryhill is appellant and you are appellees to show cause, if any there be, why the order, decree and judgement against the said George Franklin Berryhill appellant, as in said order and decree mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Walter H. Sanborn, Presiding Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 25th day of October, A. D. 1909, in the year of our Lord, nineteen hundred and nine.

WALTER H. SANBORN,
United States District Judge for the Eighth Judicial Circuit.

We, the undersigned attorneys of record in the above entitled cause for the appellees, D. A. McDougal, Perry McKay, Edmond McKay, and The Keifer Oil & Gas Company, and for Albert W. Shul-

this, hereby accept service of the foregoing citation on this the 1st day of November, A. D. 1909.

PRESTON C. WEST,
GEO. S. RAMSEY,
Solicitors for Appellees.
C. L. THOMAS,
EDGAR A. DE MEULES,
Solicitors for Albert W. Shulthis.

[Endorsed:] In the United States Circuit Court of Appeals for the Eighth Judicial Circuit. No. 2905. George Franklin Berryhill, Appellant, vs. Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay, The Keifer Oil & Gas Company, a corporation, Appellees. Citation on Appeal. Filed Nov. 8, 1909. John D. Jordan, Clerk.

(*Clerk's Certificate.*)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing transcript contains full, true and complete copies of all the pleadings, proceedings and record entries, including the opinion of said United States Circuit Court of Appeals for the Eighth Circuit, in certain causes in said Court wherein Albert W. Shulthis was Appellant, and D. A. McDougal, et al., were Appellees, No. 2901, and wherein George Franklin Berryhill, Intervener, was Appellant, and Albert W. Shulthis, et al., were Appellees, No. 2905, as full, true and complete as the same remain on file and of record in my office.

I do further certify that the original citation in each of said causes, with the acceptance of service by counsel for appellees endorsed thereon, is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this ninth day of November, A. D. 1909.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
Clerk of the United States Circuit Court of Appeals for the Eighth Circuit.

Endorsed on cover: File No. 21,900. U. S. Circuit Court Appeals, 8th Circuit. Term No. 674. Albert W. Shulthis, appellant, vs. D. A. McDougal, Edmond McKay, Perry McKay, The Kiefer Oil & Gas Company, and George Franklin Berryhill. File No. 21,901. Term No. 675. George Franklin Berryhill, appellant, vs. Albert W. Shulthis, D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company. Filed November 20th, 1909. File Nos. 21,900, 21,901.

Supreme Court, U. S.
FILED.
DEC 18 1911
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1911.

NUMBER 156.

ALBERT W. SHULTHIS, APPELLANT,

VS.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY AND GEORGE FRANKLIN BERRYHILL, APPELLEES.

NUMBER 157.

GEORGE FRANKLIN BERRYHILL, APPELLANT,

VS.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY AND THE KIEFER OIL & GAS COMPANY, APPELLEES.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AND ARGUMENT FOR DEFENDANTS BELOW—APPELLEES HERE.

PRESTON C. WEST,
GEO. S. RAMSEY,
Counsel for Appellees.

Supreme Court of the United States.

OCTOBER TERM, 1911.

NUMBER 156.

ALBERT W. SHULTHIS, APPELLANT,

VS.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY AND GEORGE FRANKLIN BERRYHILL, APPELLEES.

NUMBER 157.

GEORGE FRANKLIN BERRYHILL, APPELLANT,

VS.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY AND THE KIEFER OIL & GAS COMPANY, APPELLEES.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

STATEMENT OF THE CASE.

In view of the fact that the amount involved in this case is now over $200,000.00, and many new points of law are raised, we have expended a great deal of time and study in preparing this brief, and hope the court will pardon its length. The statement of the case by appellant is substantially correct, but we desire to bring out a few matters more fully.

This is a bill in equity for the purpose of restraining the defendants from operating for oil and gas upon the forty acres of land in controversy.

The complainant claims the right to the oil and gas in this land by virtue of a departmental oil and gas mining lease executed to him upon March 24, 1906, and filed in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, on April 21, 1906, and thereafter and on April 19, 1907, approved by Jesse E. Wilson, Assistant Secretary of the Interior. On April 4, 1907, the complainant filed the bond for the performance of the lease conditions, as required by the rules of the Secretary of the Interior and specified in paragraph four of section six of the rules and regulations, said bond being subsequently approved on May 19, 1907, by Jesse E. Wilson, Assistant Secretary of the Interior (Record, 20 to 26).

On June 5, 1906, several months after the execution of this lease, and long before its approval by the Assistant Secretary of the Interior, and long before the complainant filed the bond required by the lease and the rules of the Secretary, Edmond and Perry McKay, defendants, bought the land from the lessor and intervenor, George Franklin Berryhill, with his wife joining therein, believing at the time that they were buying the fee simple title to the same, with thirty other acres in the Creek Nation. The defendants, Edmond and Perry McKay, paid in cash the sum of $2,000.00 for this forty acres of land in controversy, together with thirty other acres, and accepted a general warranty deed therefor from George Franklin Berryhill and Clementine Berryhill, his wife, after having obtained an abstract, made by a competent abstractor, over his certificate, that there appeared of record no incumbrances against this land. They bought the land and paid the consideration without any actual notice of any kind or character that the complainant had prior thereto obtained a departmental oil and gas mining lease from George Franklin Berryhill and Clementine Berryhill, then pending before the Department of the Interior for action.

On October 12, 1906, and seven months before the Secretary approved appellant's lease, said Edmond and Perry McKay ex-

ecuted an oil and gas mining lease to Arthur B. Reese of Independence, Kansas, upon this forty acres of land in controversy for $800.00 in cash and a royalty. The negotiations for the said lease upon the part of the said Arthur B. Reese were conducted by Josiah G. Davis of Mounds, Indian Territory, who was at that time, and had been prior thereto, the authorized agent of Arthur B. Reese. Davis was also cashier of the Bank of Mounds. He instructed H. H. Adams, a competent and reliable abstractor, of Sapulpa, Indian Territory, to make an investigation as to whether or not there was then outstanding any departmental oil and gas mining lease against this land in controversy. On the 13th day of October, 1906, Davis received from said H. H. Adams a letter, now filed in the records of this case, in which Adams stated that he had made investigation at the Indian Agent's office and found no lease against said land. Acting upon this statement, and upon the statement of Edmond and Perry McKay, that said land was unincumbered, thereafter, and on the 15th or 16th day of October, 1906, the said Josiah G. Davis paid in money to Edmond and Perry McKay, the consideration for said lease, to-wit: the sum of $800.00 in cash. There was an agreement between the said Reese and Davis to the effect that Davis was to have one-half of the lease and Reese the other half, Davis having arranged with G. B. Harmon to take three-eighths of the lease out of his part. On the 17th day of October, 1906, Reese executed an assignment of a one-half undivided interest to Davis and Harmon, Davis taking a one-eighth interest and Harmon a three-eighths interest. Harmon had discussed the matter with Davis and agreed to take the said three-eighths before the lease contract had been closed with the McKays, but made no investigation upon his own responsibility to discover whether or not said land had been, prior thereto, leased upon the departmental forms. Reese and Harmon both entrusted the investigation of the matter entirely to said Josiah G. Davis, and relied upon his advice and his statements. Before paying the $300.00 for his three-eighths interest, G. B. Harmon was shown by Josiah G. Davis the letter from the abstractor, H. H. Adams, stating that there was no departmental

lease upon this land. Upon the strength of that representation Harmon paid his $300.00, and thereafter accepted the assignment from Arthur B. Reese of the three-eighths undivided interest. This lease to Arthur B. Reese was conveyed by various and mesne assignments to the defendant, The Kiefer Oil and Gas Company.

Acting under this lease, The Kiefer Oil and Gas Company in April, 1907, took possession of the forty acres of land, began to explore for oil and gas, sunk one well upon the premises, entered the oil sand, discovered oil, and was in the act of operating the property when a suit was instituted in the United States Court for the Western District of the Indian Territory some time in June, 1907, by Albert W. Shulthis, seeking an injunction against The Kiefer Oil and Gas Company to restrain it from operating said land for oil and gas purposes, claiming title to the oil and gas under his departmental oil and gas mining lease heretofore mentioned.

In August, 1907, and after the 8th day of that month, the defendant, D. A. McDougal, took deeds to the land in controversy from the brothers and sisters of George Franklin Berryhill, upon the theory that said brothers and sisters, as uncles and aunts of the deceased, Andrew J. Berryhill, had inherited the fee to the land under the law of descent and distribution in force in the Indian Territory. Said D. A. McDougal, in October, 1907, executed a lease, as shown in the record, to the Kiefer Oil and Gas Company, and the said land being in need of operation, The Kiefer Oil and Gas Company renewed operations and sunk five wells upon the land and proceeded to operate the same until the court appointed a Receiver. Complainant dismissed the old suit brought in the United States Court for the Western District of the Indian Territory and instituted this suit in December, 1907, in the United States Circuit Court for the Eastern District of Oklahoma.

This land in controversy is a part of the allotment of Andrew J. Berryhill, deceased. It becomes necessary to make a statement as to the allotment of this land. Andrew J. Berryhill, a son of George Franklin Berryhill, complainant's lessor, and Clementine Berryhill, his wife, was born on May 6, 1901, and died on

the .....day of November, 1901. George Franklin Berryhill, his father, was a duly enrolled citizen by blood of the Creek Nation, and his mother, Clementine Berryhill, was a non-citizen of the Creek Nation and never enrolled. Andrew J. Berryhill was not eligible to the roll of citizenship in the Creek Nation until the Act of May 27, 1902. Section 28 of the Original Agreement made with the Creeks in 1900, and approved by Congress on March 1, 1901, prohibited the enrollment of any citizen or any person after the ratification of said agreement on May 25, 1901, Congress having approved it on March 1, 1901, prior thereto. The tribe ratified it on May 25, 1901. Section 28 of said Original Agreement is as follows:

> "28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> All citizens who were living on the first day of April, eighten hundred and ninety-nine, entitled to be enrolled under section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.
>
> All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

> The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allottment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons" (31 Stat. at Large, 861).

It will, therefore, be seen that children born after July 1, 1900, were not eligible to the roll. In the Appropriation Act of May 27, 1902, Congress provided for the enrollment of children born after July 1, 1900, in the Creek Nation. The part of said act necessary for consideration is as follows:

> "Provided further, that all children born to duly enrolled and recognized citizens of the Creek Nation, up to and including the twenty-fifth day of May, 1901, and then living, shall be added to the rolls of citizenship of said nation made under the provisions of an act entitled, 'An act to ratify and confirm an agreement with the Muskogee, or Creek Tribe of Indians, and for other purposes,' approved March 1, 1901, and if any such child has died since the 25th day of May, 1901, or may hereafter die, before receiving his allotment of land and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them accordingly; and provided, further, that the act entitled, 'An act to ratify and confirm an agreement with the Muskogee or Creek Tribe of Indians, and for other purposes,' approved March 1, 1901, insofar as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed, and the *descent* and *distribution* of lands and moneys provided for in said act shall be in accordance with the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas in force in the Indian Territory" (32 Stat. at Large, p. 245).

Thereafter the Commission to the Five Civilized Tribes negotiated a Supplemental Agreement with the Creek Commissioners which was approved by Congress on June 30, 1902, ratified by the tribe on July 26, 1902, and proclaimed by the President on August 8, 1902. The provisions of said Supplemental Agreement pertinent to the issues in this case are as follows:

"Descent and Distribution.

6. The provisions of the act of Congress, approved March 1, 1901 (31 Stat. L., 861), insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory: Provided, that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation: And, provided, further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49.

Rolls of Citizenship.

7. All children born to those citizens who are entitled to enrollment, as provided by the act of Congress approved March 1, 1901, (31 Stat. L., 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly.

8. All children who have not heretofore been listed for enrollment, living May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890, or upon the authenticated rolls of 1895, and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L., 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs as herein provided, and be allotted to them accordingly.

9. If the rolls of citizenship provided for by the act of Congress approved March 1, 1901 (31 Stat. L., 861),

shall have been completed by said Commission prior to the ratification of this agreement, the names of children entitled to enrollment under the provisions of Sections 7 and 8 hereof shall be placed upon a supplemental roll of citizens of the Creek Nation, and said supplemental roll, when approved by the Secretary of the Interior, shall in all respects be held to be a part of the final rolls of citizenship of said tribe: Provided, that the Dawes Commission be, and is hereby, authorized to add the following persons to the Creek roll: Narwal-le-pe-es-, Mary Washington, Walter Washington, and Willie Washington, who are Creek Indians, but whose names were left off the roll through neglect on their part" (32 Stat. at Large, 500).

At the time Andrew J. Berryhill was born and at the time he died, he was not eligible to the rolls of citizenship in the Creek Nation, and had no share or estate in any of the lands of the Creek Nation. The law or act under which he was enrolled was a general provision applying to all those alike falling within its scope. However, under the provisions of the Supplemental Agreement just quoted, the Commission to the Five Civilized Tribes entrusted with the authority to make up the rolls of citizenship placed the name of Andrew J. Berryhill on the rolls, and set apart an allotment of lands as if he had been living, the same to inure to the benefit of his heirs *according to the law of descent and distribution embodied in Chapter 49 of Mansfield's Digest of the Arkansas Statutes, put in force in the Creek Nation, both by the Act of May 27, 1902, and Section 6 of the Supplemental Agreement made with the Creeks in 1902, and heretofore quoted.*

Acting under the directions of the Supplemental Agreement as provided for in Section 7, the Commission on the 8th day of October, 1902, placed upon the rolls of Creek citizens by blood, the name of Andrew J. Berryhill. Thereafter, and on April 28, 1904, the Commission allotted to Andrew J. Berryhill, deceased, this forty acres of land in controversy, with other lands in the Creek Nation, and described in the Agreed Statement of Facts, and shown by Exhibit "A" to the Agreed Statement of Facts (Record, pages 201-210).

Thereafter, and on the 10th day of October, 1904, a patent was executed by the Principal Chief of the Creek Nation, and approved by the Secretary of the Interior on the 31st day of October, 1904, and subsequently recorded in the records of the Commission to the Five Civilized Tribes. Said patent was to "The heirs of Andrew J. Berryhill, deceased." The patent was filed as Exhibits "E" and "F" to the Agreed Statement of Facts, and it will be noticed from an examination of same that the heirs are not mentioned by name (Record, pages 211-212).

Said Andrew J. Berryhill, deceased, left surviving him, his father, George Franklin Berryhill, a duly enrolled citizen of the Creek Nation, and seven uncles and aunts, and also one grandparent. The mother, Clementine Berryhill, did not inherit any part of the lands in controversy, she being precluded by Section Six of the Supplemental Agreement heretofore quoted, wherein it is provided, "That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; and provided, further, that if there be no persons of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49." Appellant insists that George Franklin Berryhill took the actual fee simple title to the land in controversy as the father of Andrew J. Berryhill, deceased.

Throughout this brief we will refer to appellant Shulthis as complainant.

First Proposition.

George Franklin Berryhill, complainant's lessor, acquired a life estate in the land in controversy, and did not own the fee, and therefore a mineral lease executed by him to complainant was void and ineffectual, because the life tenant had no estate in undeveloped oil or gas or minerals.

If we are correct in this contention, then it is unnecessary for the court to go further, because the complainant's bill must be dismissed for want of equity. It is immaterial to inquire into the rights of the defendants, because the complainant must rely

upon the strength of his own title and not upon defects in the defendants' title. This question involves a consideration and construction of Section 28 of the Original Agreement heretofore set out, Section 6 of the Supplemental Agreement heretofore set out, and Section 7 of the Supplemental Agreement heretofore set out, with an addition thereto, a construction of the application of these sections to the Arkansas law of descent and distribution embodied in Chapter 49 of Mansfield's Digest of the Statutes of Arkansas.

By Sections 7 and 28 of the Original Agreement ratified in 1901, the descent and distribution of lands and moneys of Creek citizens was controlled by the Creek law. The Original Agreement, insofar as it provided for the devolution of allotments in the Creek Nation according to the Creek law of descent and distribution, was repealed by the Appropriation Act of May 27, 1902, heretofore quoted, and further repealed by Section 6 of the Supplemental agreement. There is no controversy between counsel in this case about the Arkansas law being applicable. That is conceded, as we understand it. It is not insisted that the Creek law controls. Were the Creek law in force the mother would have unquestionably inherited the fee simple title to the land in controversy. As said, the mother is now excluded, and the question is, what title did the father acquire under the Arkansas law? We insist the father took a life estate, with the fee to the uncles and aunts, there being neither children nor brothers and sisters of Andrew J. Berryhill, deceased. This necessitates an examination of the Arkansas statutes of descent and distribution. *Complainant's counsel insist that under the provisions of Sections 6 and 7 of the Supplemental Agreement, by virtue of which this allotment was made, the court can only look to the Arkansas statutes of descent and distribution to determine who the heirs are. They insist that the court cannot look to the Arkansas statutes to determine what share or estate the heirs of Andrew J. Berryhill acquired.*

We assert that we must look to the Arkansas statutes of descent and distribution to determine two things:

First. Who were the heirs of Andrew J. Berryhill? And,

Second. The share and portion taken by the heirs of Andrew J. Berryhill in this land?

Before turning to Chapter 49 of Mansfield's Digest on descent and distribution, the court should determine for what purpose an examination of that statute will be made. The court should first determine whether it will look to the Arkansas statute for the nomination and election of the heirs alone, or whether it will look to the Arkansas statute to determine both, the heirs and the shares and estate taken by them. It is insisted by counsel for complainant that Andrew J. Berryhill, deceased, never owned this land in controversy; that he never had any title to this land; never had any estate vested in him during his lifetime, and therefore left nothing for his heirs to inherit or take by the law of descent. This is so obvious that it needs no citation of authority or argument to demonstrate the soundness of the contention. We admit that to be correct. Counsel for complainant insist, therefore, that the heirs of Andrew J. Berryhill took this land in controversy by purchase, as donees or grantees of the Creek Nation. We concede that contention to be sound and correct. This land not being in Andrew J. Berryhill at the time of his death, and no equitable or legal title being in him during lifetime, it necessarily follows that the land could not pass to his heirs by either descent or inheritance. Technically speaking, the heirs did not acquire this land by descent. Descent means, "passing downward," "hereditary succession," "the title whereby a man on the death of his ancestor acquires the estate of his ancestor by right of representation as an heir at law." Inherited means, "To take property by descent as an heir." Inheritance means, "An estate which descends, or may descend to the heir upon the death of the ancestor." The title to this land never having been in Andrew J. Berryhill during his lifetime, could not descend to his heirs or be inherited by them, *technically speaking.* The heirs were first takers and the allotment passed to them by purchase. Heirs taking by purchase, means that they acquire property as first takers, either as donees, grantees, or vendees. Heirs taking by limitation, take by inheritance or by descent from an ancestor. There we have

the distinction between taking by purchase and taking by limitation. The fact, however, that the heirs take by purchase and not strictly by inheritance, or by limitation, does not by any means solve the problem before the court.

We presume it will not be controverted that Congress had the power and the option to pass an act, with the consent of the Creek Nation, conveying the title to this land to the heirs of Andrew J. Berryhill, in the same manner, in the same right, and in the same condition as if the land had actually passed to them, technically, by inheritance.

Whether they took technically by inheritance or by purchase, that is, as donees of the Creek Nation, is absolutely of no importance in this case. When we examine Sections 6 and 7 of the Supplemental Agreement it will be at once seen that no difference and no distinction was intended to be made in the rights and estates conferred upon heirs by purchase, from those conferred upon heirs by descent or inheritance, technically speaking. We do insist that in determining who the heirs of Andrew J. Berryhill are, and what title and estate they acquired, the court will look to the Arkansas statute of descent and distribution, just as if Andrew J. Berryhill had received this land as his allotment during his lifetime by patent from the Creek Nation and died intestate. There was never any intention upon the part of either the Creek Nation or the United States to differentiate between heirs taking by purchase or donation under the treaties and heirs taking strictly by inheritance and by descent. The language of Sections 6 and 7 makes it too obvious for dispute. Section 6 of the Supplemental Agreement says:

> "The provisions of the Act of Congress approved March 1, 1901, insofar as they provide for *descent* and distribution *according* to the laws of the Creek Nation, are hereby repealed, and the *descent* and distribution of land and money provided for by said act shall be *in accordance with* Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in the Indian Territory."

This refers to Section 7 and Section 28 of the Original Agreement, that is, the Act of Congress approved March 1, 1901, and

repeals said sections. It not merely repeals said sections, but *substitutes* Chapter 49 of Mansfield's Digest, and declares that the *descent* and distribution of land and money shall be *in accordance with* said Chapter 49. Section 7, under which Andrew J. Berryhill was enrolled, provides that: "All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900, up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, *if living,* shall *descend* to his heirs as *herein provided,* and be allotted and distributed to them *accordingly.*"

If it were intended by the lawmakers to give to heirs taking as donees or purchasers a different estate from heirs by descent, technically speaking, why provide for and require first the enrollment of such deceased as a citizen of the Creek Nation? The answer to that is this: The lands were to be allotted in severalty by the Commission only to citizens whose names appeared upon the authenticated and approved rolls of citizenship. These rolls of citizenship made up the aggregate list of units to whom the lands of the Creek Nation were to be set apart and conveyed. The dead citizen *was* however the *unit of allotment* and so held by the Secretary of the Interior in written opinion quoted by counsel for appellant Shulthis on page 40 of their brief. Andrew J. Berryhill, the deceased, could not, technically speaking, be a grantee or donee. He was dead. Lands cannot be donated or granted to a dead person. That is obvious, for it was decided by the Supreme Court of the United States in *Russell* v. *Hall,* 101 U. S., 53-14, 25 L. Ed. 829. There was a reason for first placing the name of a dead citizen upon the rolls. There was a purpose in first requiring the name of a dead citizen to be placed upon the rolls. In fact and in law a party was not a citizen of the Creek Nation until his name was enrolled by the Commission to the Five Civilized Tribes. In allotting the lands the Commission was to be guided and was guided by the rolls of

citizenship. The Commission had to look to the rolls in order to ascertain from whom to set aside an allotment. In this case no allotment was made until after Andrew J. Berryhill was enrolled as a deceased citizen of the Creek Nation. The act plainly says: "The lands and moneys to which he would be entitled, if living, shall descend to his heirs." This shows clearly that the heirs, while taking by purchase or as original donees, technically speaking, were to take the allotment, however, by virtue of being "successors" to Andrew J. Berryhill, deceased, and not alone by virtue of being citizens of the Creek Nation. Not only does the act plainly say: "The lands and moneys to which he would be entitled, *if living*, shall descend to his heirs," but says: "shall descend to his heirs as *herein provided.*" How is it herein provided? Where is it *herein provided?* It is *herein provided* in Section 6, just above Section 7, where it is plainly and unequivocably provided that it shall descend *"in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas."* Section 6 not only repealed Sections 7 and 28 of the Original Agreement, but substituted in lieu of the Creek law, the Arkansas statutes, and said plainly, "and the descent and distribution of land and money provided for by said act shall be *in accordance with* Chapter 49 of Mansfield's Digest." It is insisted by complainant's counsel that the words descent and distribution are technically inaccurate, as used in Sections 6 and 7. That it was impossible for the lands to descend. We concede that the word descend and the word descent are, technically, inappropriate where the citizen died before getting his allotment, but if they have any meaning it must be ascertained and given. *The words were not used inappropriately when the allottee died after having acquired the allotment during his lifetime.* Where a citizen selected his allotment during his lifetime, but died before the patent was issued, his heirs take by descent, and not by purchase. This was fully and ably discussed and so decided by the Supreme Court of the State of Oklahoma in May, 1908, in *DeGraffenreid* v. *Iowa Land & Trust Company,* 95 Pac. 624. Se also *Jones* v. *Meehan,* 175 United States 1. The words "descend" and "descent" were unquestionably accurately and technically appropriate insofar as the

estates of dead allottees obtaining their allotments during their lifetime is or was concerned. That cannot be successfully denied or controverted. If Andrew J. Berryhill had received his allotment during his lifetime, it would have unquestionably, technically speaking, descended to his heirs and been inherited by his heirs in the strict, technical, legal sense of the word. It would have been inherited by his heirs in exact accordance with Chapter 49 of Mansfield's Digest. The heirs of Andrew J. Berryhill, if he had died the owner of the allotment, would have been not only determined and nominated by the Arkansas statute, *but their shares and proportions would have been fixed and also determined by the Arkansas statute.* The conclusion, therefore, inevitably follows that Congress and the Creek Nation, under the provisions of Sections 6 and 7, intended to convey to the heirs of Andrew J. Berryhill, or any other citizen dying before receiving his allotment, the same estate, the same share, and the same portion they would have taken by strict inheritance in the event he had died seized of the allotment. It is absolutely certain that Congress and the Creek Nation never had the slightest idea or the slightest intention of making any distinction or any difference between the application of the Arkansas law of descent and distribution to a case of strict and technical inheritance and a case where the allotment passed to the heirs, as purchasers or as representatives of the deceased, by donation from the Creek Nation. No separate provision is undertaken in the Supplemental Agreement. No distinction is made between heirs taking by purchase and those taking technically, by inheritance. None was intended. *Sections 6 and 7 are worded with a view to cover both classes of cases.* Counsel for complainant cite several cases where the courts have held that the word "descent" or "descend" was used inappropriately and inapplicably by the lawmakers. They cite these cases, holding that, although the Act said it should descend, yet it did not descend, because the deceased did not die seized and possessed of the land. As heretofore said, we concede that to be sound and correct where citizens died before getting allotment. But a clear legislative intent is shown by the language of Sections 6 and 7, to pass to the heirs where they take by purchase,

the same estate and the same share, under the same conditions and in the same manner, as if the deceased had died seized and possessed of the land, leaving it to his heirs as an inheritance. The act says: "The lands and moneys shall descend in accordance with Chapter 49 of Mansfield's Digest." "According to," and "according to law," are phrases of well-known import and meaning. If the Act had said, "the land and money shall *go to or inure* to the heirs in accordance with Chapter 49 of Mansfield's Digest," the result would be exactly the same. Where an Act of the Legislature or a contract says a thing shall be done "according to" or "according to law," the thing referred to or the law referred to is by implication carried *verbatim* into the act or into the contract. Chapter 49 of Mansfield's Digest of the Statutes of Arkansas should be read into Sections 6 and 7 as if set out in *haec verba*. In considering said sections, Chapter 49 of Mansfield's Digest is as much a part of the wording and phraseology of Sections 6 and 7 as if copied therein *verbatim*.

Some Authorities.

In a recognizance the obligor was recognized in a certain sum as bail, "according to Act of assembly;" and the words "according to" must be construed as making the Act of the assembly which fixes the condition of the recognizance part of the recognizance.

Harvey v. *Beach*, 38 Pa. 500.
Words and Phrases, pages 84 and 85.
Duffy v. *Hargan*, 50 Atl. 678.

The domain of the Creek Nation was owned by the tribe as a political entity. The United States had issued a patent to the tribe conveying the land to the tribe as a nation in 1838. In 1893 Congress passed the Act creating the Dawes Commission, declaring on the face of the Act that its purpose was to bring about the allotment of the lands of the Five Civilized Tribes in severalty with a view to eventual statehood. The tribe in 1901, by the Original Agreement consented to the allotment of the lands among the citizens in severalty. Here, therefore, was a vast and valuable estate to be administered and wound up. The tribal government was prac-

tically emasculated in 1898. The Creek laws were abrogated in 1898, and the Creek courts abolished. See Act of Congress of June 28, 1898; 30 Statutes at Large 495, Sec. 26 and 28. This valuable landed estate of the Creek Nation went into the process of administration, to be allotted among the beneficiaries, its citizens.

In the ninth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1902, said report being drafted after the Act of Congress of May 27, 1902, and before the ratification of the Supplemental Agreement, the Commission uses the following significant words:

> "Should the Supplemental Creek Agreement fail of ratification by the tribe, the exigency will be in a measure met by the provisions inserted in this bill looking to the enrollment of Creek children, and to the descent and distribution of the lands and moneys of that tribe."

It was the purpose of the Commissioners of the United States as the representatives of the government to bring about an equitable distribution and an equitable equalization of the lands and moneys of all of the Five Civilized Tribes among their citizens. An equitable equalization and distribution was the guiding star in making the treaties and the divisions of the property of the tribe. The provisions contained in Section 6 of the Supplemental Agreement providing for the enrollment of children born after July 1, 1900, was inserted in the Supplemental Agreement at the instance of the Commissioners for the Creek Nation and at their request and solicitude.

In the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, the Commission says in regard to the Original Agreement:

> "Certain portions of the agreement were not acceptable to the members of the tribe and approval on the part of the councilmen was given only with the understanding on their part that the agreement might be supplemented in a manner to correct inaccuracies and discrepancies and make clear those

portions which appear ambiguous. It may be safely stated that the tribe as a whole desires that all children born up to and including May 25, 1901 (the date of the ratification of the agreement), be enrolled. Under the agreement ratified by them (that is, the Original Agreement) no child born subsequent to July 1, 1900, may be enrolled. In this and certain other particulars, it is believed that the agreement should be amended, and steps to this end will doubtless be taken in the near future."

In the preface of the eighth annual report of the Commission to the Five Civilized Tribes for the fiscal year ending June 30, 1901, in discussing the condition of affairs in the Five Civilized Tribes, the Commission says:

> "To allot them land upon any other principle than equality of value would remedy none of the evils arising from the unequal distribution of land which have so long existed; while to apply this principle, as the law provides, involved one of the largest, most intricate and difficult undertakings in which our government has ever been engaged."

In every agreement made with each of the Five Civilized Tribes, and in the Curtis bill passed in 1898, providing for the allotment of the lands, there is practically the same declaration that the lands shall be allotted among the citizens, "giving to each, as far as possible, his fair and equal share thereof."

In the preface to the ninth annual report of the Commission, for the fiscal year ending June 30, 1902, the Commission says, in speaking of the object and purpose of the United States and the work of the Commission:

> "Debilitated governments, through the art of diplomacy, were to be dethroned; communal land holdings transmuted to individual ownership; the *bona fide* members of the tribes to be identified, and all with the least possible hazard to political and property rights. Through the legislative function, agreements which are to become law for the *administration of these estates* are negotiated. Through the judicial the right to participate as members of the tribes is adjudicated,

and contentions between members involving the right to possession of given tracts are determined. Through the executive, the laws governing many matters affecting the property of the Five Tribes are administered."

In the tenth annual report of the Commission for the fiscal year ending June 30, 1903, on page 8, the Commission says:

> "Manifestly, two indispensable duties lay at the very beginning of the business. First, to determine who were the *bona fide* citizens or heirs entitled to inherit these properties; and, second, to take an inventory of the properties to be divided. When these two tasks had been performed as to any tribe, then only was it possible to begin the intelligent and *equitable division of its estate.*"

On page 9 of the same report the Commission says:

> "The work of determining the rightful citizens or heirs and of getting the properties into necessary shape for distribution was all indispensable preliminary work, and by far the greater part of the work to be done."

Thus it will be seen that an equitable equalization was the guiding star in allotting and distributing the domain and funds of the nation. If heirs taking by purchase were to have a different estate from those taking by strict descent an equitable equalization was impossible.

The Creek Nation, like a testator making a will devising a valuable estate, made these treaties with the United States, the original in 1901, and the supplemental in 1902, its testamentary documents, naming the beneficiaries and providing for the distribution of its vast and valuable estate. Tottering upon dissolution, the Creek Nation, as well as the other tribes, devised and bequeathed its land and funds to certain devisees and legatees, to-wit, its citizens and the heirs of dead citizens. In the 7th Section of the Supplemental Agreement it devised an allotment of 160 acres of land to "all children born to those citizens who were entitled to enrollment, as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900 (and up to May 25, 1901), and living upon

the latter date," requiring such children to first be enrolled upon the list of beneficiaries. This roll of beneficiaries and devisees was to be made by the Commission, we might say, as executors with the will annexed—that is, the treaty or agreement. This devise of 160 acres was made to every such child born after July 1, 1900, and living May 25, 1901. The will, that is, the agreement, declared that in the event such child had died prior to receiving the lands and moneys he otherwise would have been entitled to, if living, the lands and moneys which he would have had, should pass to his heirs, "*in accordance* with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas."

With this analogy, let us turn to the numerous decisions of the courts defining the rights of devisees under wills where the devise is made, and we will say, to John, and in the *event of his death*, to the heirs at law of John. The decisions cited by complainant are in cases where the devise was made to "the heirs of John," and not "to John, and in the event of his death, to his heirs." In such cases the element of succession is entirely eliminated, and some courts hold that the heirs take equally, but even in those cases, the weight of authority is against complainant. The courts have repeatedly construed such devises or bequests, and we believe the decisions of the courts construing wills devising property to A, or to the heirs of A, will furnish a correct solution of this problem and a correct construction of Sections 6 and 7 of this Supplemental Agreement. The question therefore recurs: Shall we look to the Arkansas law to ascertain who the heirs are, and there stop, or shall we look to the Arkansas law to determine, first, who the heirs are, and, second, the share or portion taken by such heirs?

There are numerous decisions, as before said, defining and construing a devise to the heirs of John, or to the heirs of A, where the courts held that such heirs took by purchase and not by inheritance or descent. These decisions will therefore furnish abundant light upon this controversy, and, in our judgment, be controlling. A devised 100 acres of land to the heirs of B. The heirs of B necessarily took by purchase. They take as donees from A. They do not take by inheritance or descent from A. They are not the

heirs of A and cannot take by inheritance from A. They were the heirs of B, but do not take the property in question from B by descent or inheritance, because B, like Andrew J. Berryhill, never owned the property and was not seized and possessed of it during his lifetime. Such heirs of B, under the will of A, necessarily took by purchase from A, just as the heirs of Andrew J. Berryhill, deceased, took by purchase in this case as donees from the Creek Nation.

With this statement, let us examine the decisions:

In *Mullen* v. *Reed*, 64 Conn. 240 (42 Am. St. Rep. 174), the Supreme Court of Connecticut had under consideration the effect and meaning of the words "heirs at law," as used in a benefit certificate of membership in the Bay State Beneficiary Association, wherein the association agreed "to pay to the *heirs at law* of said member, in sixty days after due proof of the death of said member, a sum equal to the amount received from one death assessment, but not to exceed five thousand dollars."

It is clear that the heirs at law of the member did not acquire by inheritance the sum agreed to be paid by said membership certificate. They would take said sum as first takers, that is, by purchase—in other words, as donees. They took just as the heirs of Andrew J. Berryhill took. The court said:

> "Heirs at law, when used in such an instrument, indicate an intent that such persons are to take in the *same manner*, and in the *same proportions* as if the property had come to them as intestate estate, unless the contrary intention appears."

The court cites and approves the Massachusetts cases, and especially *Houghton* v. *Kendall*, 7th Allen 72, wherein the Supreme Court of Massachusetts said:

> "In this commonwealth, we find no authority which would conflict with the adoption of the construction which seems to us reasonable, that when the word 'heir' is used in the gift of personality it should primarily be held to refer to those who would be entitled to take under the Statute of Distribu-

tions, and to indicate that they should take in the *same manner* and in the *same proportions* as if it had come to them as intestate estate of the person whose heirs they are called."

The court cited and approved the following cases, all of which we have read and find to fully sustain our contention:

Sweet v. *Dutton*, 109 Mass. 589.
White v. *Stanfield*, 146 Mass. 424; 15 N. E. 919.
Kendall v. *Gleason*, 152 Mass. 457; 25 N. E. 838.
Bassett v. *Granger*, 100 Mass. 348.
Rand v. *Sanger*, 115 Mass. 124.

Heirs, or heirs at law, technically, mean those succeeding by inheritance to the real estate of the ancestor. *Next of kin*, technically, mean those succeeding to the personal estate of the ancestor.

A great many decisions have discussed the intention of the testator when he used the words heirs, or heirs at law, when his will only disposed of personal property, and the decided weight of authority holds that in such cases the testator intended to have his personal estate pass to those nominated by the statute of distribution, instead of those nominated as heirs by the statute of descent. It is not important in this case to go into a discussion of the distinction between heirs at law and next of kin as used by testators in their wills. Sometimes they are used interchangeably.

In *White* v. *Stanfield*, *supra*, the testator left in trust for his son the sum of ten thousand dollars, to be held by the trustee during the natural life of the son, to pay him the income thereof and to pay over the principal of said sum on his decease (the son's death), to his (son's) heirs at law. After discussing the question as to whether or not heirs at law meant those designated by the statute of descent or the statute of distribution, the will bequeathing only personal property and the testator having no real estate, the court said:

"In the case at bar, those who are to take after the life estate do not take by way of succession or substitution, but as an independent substantive gift; but that which they were to take is personal property intended to be kept as such, and thus to be paid over at the decease of the life tenant, and, notwithstanding the use of the words heirs at law, it should

be paid to his distributees, and one-half thereof to his widow, as a person so entitled *under the statute*. The words do not appear to have been used technically, nor would it have occurred to the testator unless his attention had been called to it by legal advice, that he was in danger, by the use of them, of sending *his property* in a different direction from that it would have taken if it had actually been the *property of his son.*"

The court further said:

"When a testator establishes a fund consisting of personal property for the purpose of providing an income for life for his son, and this is apparently his principal object, and when, after his son's decease, he directs it to be paid over to his *son's heirs at law*, his intention is not so much to make a bequest of it, or direct further how it shall go, as it is to *surrender* the disposition of the fund, *as if it were actually the son's*, to those upon whom the law would in such case devolve it."

The court then held that it passed to those nominated by the statute of distribution in the *same manner* as if it had been the property of the son during his lifetime, and in the *same share and portion prescribed by the statute*, just as the lawmakers intended the heirs of Andrew J. Berryhill to take—that is, in the *same manner*, and in the *same share and same portion, as if the allotment had been set apart to Andrew J. Berryhill during his lifetime*. The words of the statute make this plain.

In *Kendall* v. *Gleason, supra*, the testator devised certain property to trustees, who were to permit his three sons to occupy it. At the request of either of the sons the trustees were to have the property appraised and conveyed to any two of them who should wish to purchase at the appraised value, and if no two wished to purchase, the trustees were to sell the property. If the sons could not agree, the trustees were directed to sell the property and invest the proceeds, one-third of which was to be paid to each son upon his arrival at the age of fifty years. The following language is worthy of note:

"If either of my sons shall die before arriving at the age of fifty years, I direct his share to be paid by my said trustees to his legal heirs."

This is very similar to the language of the statute in question, wherein it is provided:

"And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to *his heirs* as *herein provided*, and be allotted and *distributed* to them *accordingly*."

One of the sons died before reaching the age of fifty. The court said:

"On the death of Stillman A. Gleason, the trust terminated as to his share, which fund immediately became payable to his *legal heirs*. The will contemplated a change of the *real estate* to personal property in the hands of the trustees, and that it should go to the heirs in the form of personal property. The words legal heirs must therefore be construed to mean those who would take personal property under the statute of distribution. One-third of the fund held by the trustees should be paid to the heirs of Stillman A. Gleason, in the *proportions* of one-third to his widow, Mary E. Gleason, and two-thirds to his minor son, Benjamin W. Gleason, whose share will be held by his guardian."

In other words, the court not only looked to the statute to determine who the heirs were, or who the distributees were, but the share and portion taken by each. The heirs of Stillman A. Gleason, the son of the testator, did not take by inheritance from the testator but took as donees, that is, by purchase, and yet the Supreme Court of Massachusetts in that case, as well as in many others, went to the statute, not only to determine who the heirs were, but also the share and portion taken by each.

In view of the fact that the decisions of the Supreme Court of Massachusetts have long ranked first in weight of authority, we do not hesitate to cite a number of decisions of that court.

In *Holbrook* v. *Harrington et al.*, 16 Gray, 102 (Mass.), the Supreme Court of Massachusetts said:

> "A devise to heirs, whether it be to one's own heirs or to the *heirs of a third person,* designates not only the persons who are to take, but also the manner and proportions in which they are to take; and when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

In *Rand* v. *Sanger,* 115 Mass. 128, the court said:

> "The devise to heirs designates not only the persons who are to take, but also the *manner* and portions in which they take. Where there are no words to control, the law presumes the intention of the testator to be that they shall take as heirs would by the rules of descent. In the case at bar it does not sufficiently appear from the terms of the will that it was the intention to use the words '*my legal heirs*' in any other than a strict legal sense, and the rule must be held to apply in determining who are to take. The general rule must also apply in determining the *proportions* in which the heirs shall take."

The Supreme Court of Pennsylvania in a large number of cases held that a devise to the heirs of the testator or to the heirs of a third person refers to the law of descent and distribution to determine two things: First, who the heirs are; and, second, the quantity and proportion of the estate taken by them. In Baskin's Appeal, 3rd Pa. St. Rep. 304, the court had under consideration a will wherein the testator directed: "Then my will is, that the remaining part of my goods, stock, etc., shall be impartially appraised, and after such appraisement is made, the same shall be equally divided between all the heirs." The court says:

> "We are of the opinion that the testator has reference to the *intestate* laws, by which his estate will be divided among his children and grandchildren *per stirpes.* After making certain bequests, he directs the remainder of his goods, stock, etc., to be appraised and equally divided among the heirs. By these expressions, he meant, his own heirs, which can only be

ascertained by resorting to the statutes of distribution, as has often been done in analogous cases; and, taking this to be the rule, it descends to the children and grandchildren *per stirpes*. This shows the persons *who are to take*, and the same rule must be applied to *quantum* of the estate."

In Minter's Appeal, 40 Pa. St. 114, the court had under consideration a will wherein the testator says:

> "The balance and residue of my estate I order and direct my executors to divide equally, share and share alike, amongst the children of my brother, Adam Minter, deceased, and the children of my brother Martin G. Minter, and to my sister, Barbara Savol. It is my will that said Barbara and the children of said brothers, Adam Minter and Martin G. Minter, shall have the residue of my estate, share and share alike."

The testator died in 1858 unmarried and without issue, leaving two children of his brother Adam and fourteen children of his brother Martin G. Minter, and two children of his sister, Barbara Savol, who had died about eight years before the date of the will. There were others, nephews and nieces, the children of his deceased brothers, Michael and Henry, to one of whom he gave a legacy of $210. The legacy to Barbara Savol would have lapsed except for a statute passed by the legislature of Pennsylvania in 1844, which saved the bequest to the testator's sister, Barbara Savol from being void, though she had died before the will was written, leaving children surviving the testator. The court said in passing on this case in regard to what estate the heirs of Barbara Savol would take:

> "When we find a man distributing his estate, in whole or in part, among his next of kin, and he leaves the proportions in which they are to take doubtful, it is quite natural for us to suppose that he had the statutory or customary form of distribution in his mind, and to interpret his will accordingly. This would classify the legatees as he seems to have done, and as the court below did, and allow the *three classes* to take as their parents would have done; thus, they, themselves, take by *quasi* representation and *per stirpes*."

The court held that the children of Barbara Savol took the share she would have taken if she had been living at the date of the death of the testator, and had died intestate.

In Dunlap's Appeal, 9th Atl. Rep. 936 (Pa.), the court said:

> "Where a man gives the whole or a part of his estate to his next of kin and leaves the proportions doubtful, it is natural to suppose that he had the statutory form of distribution in mind, and to interpret his will accordingly."

A large number of Pennsylvania cases have held that where the proportion is doubtful under the terms of the will the intestate laws will govern.

Sheetz Appeal, 82 Pa. St., 213.
Lipman's Appeal, 30 Pa. St., 180.
France's Estate, 75 Pa. St., 220.
Fissel's Appeal, 27 Pa. St., 55.

The Supreme Court of South Carolina, in Third Richardson's Equity, 543 (55 Am. Decisions, 646), discussed at length a devise or bequest to *heirs* or heirs at law. This opinion is worthy of diligent consideration, inasmuch as it discusses the English and American decisions on the question and overrules some former decisions of the courts of South Carolina. Believing that the court will read this decision in full, we will not quote very extensively from it. Among other things, however, the court said:

> "Whatever may be the doctrine of the English cases on this subject, the state of our law and of *public policy* justify the rule that whenever we are compelled by the terms of description, in a devise or grant, to resort to our statute of distributions for the purpose of ascertaining the objects of the gift, *we must also resort to the statute to ascertain the proportions in which the donees shall take, unless the instrument making the gift indicates the intention of the donor that a different rule of distribution shall be pursued.*"

The court further said:

> "In the case under consideration the Court of Appeals in equity could not have attained the conclusion that the 'heirs

of the body' of the tenant for life took as purchasers, within the rules as to the remoteness of limitation, otherwise than by construing these terms to mean the descendants of the tenant for life living at the time of her death, or something equivalent. No one can take as heir of the body of another unless he fulfills the description, and is not only such a person as would take the real estate of that other under our act of distributions, but likewise a lineal descendant. As we are obliged then, to ascertain from the statute of distributions *who are the heirs of the body*, it is a logical consequence that we should look there also to ascertain their share in the subject of gift. The statute is the exponent of the full meaning of the donor, unless he has declared a contrary intent, which is not pretended in the case before us."

In discussing whether heirs taking by purchase or as donees, take the shares and portions fixed by the statute, as we insist in this case, the court said:

"It was strongly insisted in the argument of this case, that whenever several persons took as purchasers under one gift, they must take *per capita*, and that no case could be found to the contrary. But where is the necessary connection between the ideas of *purchase and equality?* Surely a testator might provide for an unequal distribution among those taking by purchase; as by a gift to A and the three children of B, so that A should take one-half, or by a gift to C for life, and upon his death to his children then living, the eldest son of C taking one-half, however numerous such children may be. It is useless, however, to suppose cases when examples may be found in the books. In 2 Jarm. on Wills, 46, it is said:

'The statute of distribution not only determines the object of a gift to "relations," but also regulates the proportions which they take, the gift being held to apply to the next of kin and the persons whom the statute admits by representation, the whole being taken *per stirpes*, not *per capita;* that is, the property is distributable proportionately among the stocks, not equally among the several individual objects of every degree.' "

The Supreme Court of South Carolina in a much later case decided in 1892, *Dukes* v. *Faulk*, 37 S. C., 255 (34 Am. St. Re-

ports, 745), discussed the question as to what method of distribution or division should be made among a class taking as purchasers, where the devise was to the legal heir or heirs of the body, or kindred phrases, and expressly held that where it was necessary to look to the statute to determine who the heirs were, it was also necessary to look to the statute to determine the portions in which they should take.

The court said:

> "If, therefore, the gift is to a class of persons designated as heirs of a particular person, then, as it is necessary to resort to the statute to ascertain who are the individuals composing the class, resort must also be had to the statute to determine how or in what proportions such individuals shall take. This is upon the presumption that the donor, having by implication, at least, referred to the statute as to the persons who were to take, also intended that reference should be had to the statute to determine the proportion in which they should take, unless he expressed a different intention."

The court in this case quotes from *Campbell* v. *Wiggins,* Rice Equity, 10, and other South Carolina decisions, and says that decision was much shaken in *Templeton* v. *Walker,* 55 Am. Decisions, 646, and in effect overruled. In *Campbell* v. *Wiggins,* Rice Equity 10, the chancellor had under consideration the question of what share goes to each heir under an Act of the Legislature granting certain land to the heirs of Wiggins, deceased, and held that as the heirs took by purchase they took equally, but that decision was overruled in the later cases cited above. See also:

Lott v. *Thompson,* 15 S. E. Rep., 278 (S. C.).

The Supreme Court of Connecticut, in 1897, held that a bequest to the heirs of testator's niece, who died before the testator, was a class gift, which on the death of the testator vested in the descendants of the deceased niece *per stirpes.*

Ruggles v. *Randall,* 38 Atl. Rep., 885.

The Supreme Court of Tennessee in 1898 had under consideration a will containing the following clause:

"I give and bequeath to my beloved wife, Ollie C. Reese, a certain tract or parcel of land containing, by estimation, about 120 acres, and bounded as follows: * * * To have and to hold as long as she lives, at her death the said land is to be divided between my *heirs at law.*"

The court said:

"This is an explicit devise of the land to the widow during her life, with the remainder in fee to the heirs at law of the testator. The chancellor treated the remainder as vested, but the Court of Chancery Appeals was of the opinion that it was contingent. We concur in the latter view. The remainder was contingent, because the testator obviously intended the land to be divided *at the death of his widow* among such persons as should then sustain to him the relation of heirs at law. The remainder-men are to be ascertained, not at his death, but at the death of his widow, the life tenant; *and they are to be such persons as should at that time be his heirs at law.*"

The court further said:

"In what proportion do the remainder-men, when ascertained, take the land? The chancellor held that they take *per stirpes*, according to the statute of descent; and the Court of Chancery Appeals held that they take *per capita*, share and share alike. On this question we concur in the holding of the chancellor. When the testator directed that the land should be divided among his heirs at law, he meant that the persons falling within the description should take *as heirs at law would take*. The phrase *heirs at law* indicates who shall take, and *how they shall take.*"

Forest et al., v. *Porch et al.*, 45 S. W. Rep. 676.

The Supreme Court of Michigan had under consideration a will providing for a life estate free from taxes, to be held by the testator's widow, in land to be paid for out of his other estate, and also gave her an annuity payable regularly after his decease, and made all of his other property, real and personal, subject to disposal, if necessary, to meet that and other charges; and then, after providing for certain other persons, left the "residue of his

estate to *descend to his lawful heirs according to law.*" The court held that leaving it to descend to his lawful heirs according to law, means simply, "that the heirs who appear to have been in different degrees of consanguinity should take their *shares* in the order of representation prescribed by the statute."

Bailey v. *Bailey*, 25 Mich. 185.

The Supreme Court of Illinois had under consideration the following clause in a will: "I give, devise and bequeath to my heirs at law the remainder of my estate." The court said in construing this:

> "We must invoke the aid of the statute to determine the persons who constitute the class. When invoked to determine the persons to take, we must follow its provisions as to the *quantity* they shall take."

The court said further:

> "The persons to take, and the proportions, must be determined by the statute of distribution."

Richards v. *Miller*, 62 Ill. 417-426.

The Supreme Court of Iowa had under consideration a will containing the following clause:

> "It is my will that at the death of my brothers, Isaac J. Lester and Garra Kimball Lester, that my entire estate, both real and personal, be divided between my heirs at law."

The court, among other things, said:

> "The court is of opinion that, according to the established rule of law, a devise to heirs, whether it be to one's own heirs or to the heirs of a third person, designates, not only the persons who are to take, but also the *manner* and *portions* in which they are to take, and that when there are no words to control the presumption of the will of the testator, the law presumes his intention to be that they shall take as heirs would take by the rules of descent."

Johnson v. *Bodine*, 79 N. W. Rep. 348.

The Indiana cases are in line with this holding. See

Henry v. *Thomas*, 20 N. E. 519.

Wood v. *Robertson*, 15 N. E. 457.

The Supreme Court of Indiana in these two cases cite and approve the Massachusetts and Pennsylvania cases, and also the New York cases, which will be hereafter mentioned.

The Court of Appeals of New York has had this question under consideration, and in cases which we believe are not only well considered, but absolutely in point. In one case that court had under consideration a will wherein the testator, who left surviving him only his wife and collateral relatives, gave to his wife one-half of the income of all of his property for and during her life, "without restraint, deduction or interference of any kind," and gave the "remaining of the income accruing during her life, after payment and discharge of all taxes, assessments and charges, and the reversion after the death of his wife, to his *legal heirs.*"

The court said:

> "The remainder was devised and *bequeathed to his legal heirs,* but in the manner and under conditions manifesting a very decided purpose to *postpone* their estate in remainder until the death of his wife."

The court further said:

> "We are thus required to determine who the testator meant by *legal heirs,* and whether he intended to designate by that phrase the individuals merely who should take, or to fix also the *quantity of estate* which should devolve upon each. If he used the words legal heirs solely to identify individuals who were to take as devisees, they would be deemed in general to take as purchasers, *as if all had been named,* and in the absence of any modifying language of the will, would take as tenants in common and *per capita. That, of course, assumes that the interest devised is in some way different from that which would have descended had no will been made.* But the testator, I think, himself indicated the sense in which he used the phrase, and what he meant by it. Where he declares the consequences of the forfeiture of any share, he uses this language: 'The share that would otherwise have gone to him or her shall be divided among the remaining heirs according to law.' This undoubtedly means according to the

law which governs in a *case of intestacy*. It evidently respects the *quantity of interest*, as well as the persons who are to take; for the division—that is, the proportion—is to *be according to law*. This language tends to explain the meaning of the testator in the use of the word heirs in the devise of the remainder. It is qualified by the word legal, which seems to have been used in the same sense and to express the same idea as the phrase *according to law*."

The court then held that the remainder-men should take as in case of intestacy, and so *per stirpes*.

Woodward v. *James*, 22 N. E. Rep. 150.

It is well here to return to Sections 6 and 7 of the Supplemental Agreement, putting in force the Arkansas law, and again note the language, wherein the statute says:

> "And the descent and distribution of land and money provided for by said Act shall be *in accordance* with Chapter 49 of Mansfield's Digest."

And in Section 7, where the statute says:

> "And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the land and moneys to which he would be entitled, if living, shall descend to his heirs as *herein provided*, and be allotted and *distributed to them accordingly*."

In *Lawton et al.* v. *Corliss*, 27 N. E. 847, the Court of Appeals of New York had under consideration a will containing the following clause:

> "I order and direct that my estate be divided among my heirs at law *in accordance with* the laws of the state of *New York*, applicable to persons who die intestate, and that no bond or security whatever be required of my executors hereinafter named in the settlement of my estate, real or personal."

It will be noticed that the language of this will is almost identical with a part of the language of the Supplemental Agreement, wherein it says:

"Divided among my heirs at law in accordance with the laws of the State of New York."

The Supplemental Agreement says:

"The descent and distribution of lands and moneys provided for by said Act shall be *in accordance with* Chapter 49 of Mansfield's Digest."

In considering this will the court said:

"The use of the words heirs at law in such a connection indicates, as I think, the legal heirs, in the sense of persons who would legally succeed to the property in case of intestacy, according to its nature or quality, the heirs at law taking the realty and the next of kin the personalty. The cardinal idea seems to be that the division should be in accordance with the statute in case of intestacy. This, as was said by the general learned term, seems to be the plain import of the language used by the testator, giving to the persons forming each of these classes whatever of the estate would go to them under the laws of the state. As already suggested, there is nothing to indicate any other purpose. It is precisely as if the testator said: 'I do not intend that there shall be any dispute over my estate. I mean to declare that the persons who are recognized by the law of the State of New York as entitled to a portion of it shall have it to the *extent* that the law declares. My *real estate* shall be divided among those to whom it would descend, and my personal estate shall be divided between those who would be entitled to it, just as if no will had been made, and I make this will only for the purpose of securing the co-operation of the executors "whom I have named to take charge of my estate and protect it."' This construction is in conflict with no decision of this court to which our attention has been called, and is in accordance with the recent case of *Woodward* v. *James*, 22 N. E. Rep. 150, which we regard as controlling."

The court discussed the meaning of the words *according to law* and held that under the will those denominated by the statute as his heirs would take the real estate in the proportions prescribed by the statute, just as if the deceased had died intestate—that is, they took *per stirpes*, and not *per capita*.

We believe these authorities are in point and furnish the correct rule of construction to be applied to Sections 6 and 7 of the Supplemental Agreement, putting in force Chapter 49 of Mansfield's Digest of the Statutes of Arkansas on descent and distribution. The lawmakers never intended to make any distinction between the heirs and their proportionate shares where the allotment was set apart to the heirs after the death of the citizen, and the heirs taking by strict and technical inheritance the allotment of a deceased citizen who had received his allotment before his death. As heretofore pointed out, an equitable equalization in the allotment and distribution of the lands of the tribes was the guiding star. If we are to look to the statute of descent merely to determine who the heirs are in those cases where the heirs take by purchase, and not look to the statute of descent and distribution to ascertain their proportions and shares, then those heirs taking an allotment as donees, and not by strict and technical inheritance, would receive and obtain a different estate and a different share of the tribal lands than heirs taking strictly by inheritance. No distinction was ever intended, and we do not believe it would be just and equitable for the court to, by any fiction of law and construction, differentiate between the rights, equities, shares and proportions of heirs of Andrew J. Berryhill, had he received his allotment during his lifetime and died seized and possessed of the same.

As said by the Commission to the Five Civilized Tribes in their annual reports, heretofore referred to, the lands and moneys of the Creek Nation constituted a vast and valuable estate to be administered upon and allotted and distributed to the beneficiaries named in the original and supplemental treaties.

A Review of Some Authorities Cited by Counsel for Appellant Shulthis.

They cite and quote extensively from the case of *Ward* v. *Stow*, a decision in equity from North Carolina, rendered in 1834, and reported in 27th American Decisions, 238.

We do not believe this case is applicable under the wording of the Supplemental Agreement. The testator provided in his will as follows:

> "It is my will, and I do now allow that all the remaining part of my estate, both real and personal, be *equally* divided amongst the heirs of my brother, John Ford; the heirs of my sister, Nancy Stow; the heirs of my sister, Sally Ward, and my nephew, Levi Ward."

John Ford, one of the brothers, had living at the death of the testator four children, and Nancy Stow nine children. At the date of the will Sally Ward was already dead, having left two surviving children, of whom Levi Ward, the nephew, was one. After the death of the testator a petition for partition was filed. The court held that the partition must be made *per capita*, and not *per stirpes*. We would be glad for the court to read this decision in full. Among other things of note, however, the court said:

> "Every voluntary disposition of property takes effect according to the agreement of the contracting parties. Their intentions, properly expressed, give the mode and the form that constitute the law of the conveyance. The regulations of the state for the transmission of inheritances left vacant by death do not, *proprio vigore*, operate on the subject matter of such conveyances, and can apply to them only so far as the parties have *adopted them and directed them to be so applied*."

The heirs of the dead brothers and sisters took by purchase, and the court held:

> "Here the word heirs has a double meaning and a mixed effect. The individuals who first take under this term, take as purchasers, designated by the relation which they bear to a deceased ancestor; but they take an estate, which, by the form of the donation, is to pursue the same course of succession to the same extent of duration, and through the same persons as if it had attached to and descended from such ancestor. Such a limitation is of an intermediate description between a descent and a purchase, in point of acquisition hav-

ing the quality of the latter, as not being derived from or through the ancestor, but in regard to its devolution referable to the former."

The court further said in this case:

"The term heirs has here but a single meaning and can produce, as we think, but a single effect."

The reason given by the court for its decision that the heirs took *per capita* and as equal tenants in common is expressed by the court in the following language:

"There is no *reference* expressly or impliedly to the canons of descent, or to the statute of distributions; not even for the purpose of ascertaining the first takers of the property, and still less for fixing the proportions in which they shall take it. An improper term has been used by the testator, and in order to effectuate his intention, we are bound to give the will the same construction as though he had used the appropriate expression. If by 'heirs' he meant children or issue, we are to read the will as if it were written children or issue."

In a note to this case as reported in the 27th American Decisions, 238, the annotator says:

"There are, however, certain restrictions upon the generality of this rule laid down by certain of these cases cited; thus, if the devise be to the testator's own heirs, the heirs take *per stirpes*, not *per capita;* so if there be anything in the will indicative of the intention of the testator that the persons described in the class shall take as a unit, then the division shall be *per stirpes*, not *per capita*, as where construing that the division should be made *per capita*, would require a new division of the property every time that a child should be born in any one of four families."

The annotator cites several of the cases.

In the case of *Fabins, et al.* v. *Fabins, et al.*, 5 N. E. Rep. 650 (Mass.), we do not see how the decision can be used as authority against us or to sustain the contention of the complainant, under the peculiar wording of the will therein considered. The court said:

> "It remains to determine who shall take under the gift 'to the heirs of my children.' It is contended in behalf of the widow of the deceased's son that these words should be read in a double sense so as to mean the heirs at law in relation to the real estate, and those persons who would be entitled under the statute of distribution in relation to the personal estate. No general rule can be cited under which all of the decisions can be classified, but, in general, where there is a gift to a *person or his heirs,* the word heirs denotes succession or substitution; the gift being primarily to the person named, or *if he is dead,* then to his heirs in his place. In such cases it has often been held that the word 'heirs' should be construed to mean the persons who would legally succeed to the property according to its nature or quality; and that the heirs at law would take the real estate, and the next of kin or persons entitled to inherit personalty would take the personal estate."

It strikes us that this comes very close to the words of the statute now under consideration. Sections 6 and 7 of the Supplemental Agreement provided, and was intended to provide, for the devolution of allotments in *both* classes of cases and in *both,* according to the *same* rules of descent. That is, the heirs of an allottee dying seized and possessed of his allotment were to take in accordance with Mansfield's Digest, and the heirs of a citizen who had not received his allotment at the date of his death were *substituted* for the dead citizen and succeeded to what would have otherwise passed by allotment of the dead citizen.

Complainant's counsel also rely upon a line of cases construing Sections 2269, 2291 and 2292 of the Revised Statutes of the United States. Let us examine these statutes and the decisions. Sections 2257-2288 constitute Chapter 4 of Title 32 of the Revised Statutes. This chapter, with the exception of Sections 2275 and 2276 and 2286 was repealed by the Act of Congress of March 3, 1901, and Section 2288 was amended by such Act. Under these sections the public lands belonging to the United States were made subject to pre-emption under the conditions, restrictions and stipulations provided by law. The pre-emptor had to be the head of the family, or his widow, or a single person over the age of twenty-

one years, and a citizen of the United States. Lands subject to pre-emption could be settled by a citizen, and upon improving the same, not exceeding 160 acres, by erecting a dwelling house thereon, the pre-emptor was authorized to enter with the register of the land office for the district in which the land was situated any number of acres of said land not exceeding one hundred and sixty, as aforesaid. The pre-emptor was required to make an oath by Section 2265, and file the same. Section 2263 required the pre-emptor prior to entry being made to furnish the proof of settlement and improvement required by the law to the satisfaction of the register and receiver of the land district agreeable to such rules as the Secretary of the Interior might prescribe. All assignments and transfers of the right prior to the issuance of patent being declared null and void.

Section 2264 provided that when any person settles or improves a tract of land, subject at the time of settlement to private entry, and intends to *purchase the same* under the provision of the law, he should within thirty days after the date of such settlement file with the register of the proper district a written statement describing the land settled upon and declaring his intention to claim the same under the pre-emption laws. He was also required to, within twelve months after the date of such settlement, make the proof, affidavit and payment required by the statute. If he failed to file said written statement or make the affidavit, proof and payment within the period named, the tract of land so settled and improved should become subject to re-entry by any other purchaser. Other requirements were designated by the statute. Section 2269, the one mainly under consideration, is as follows:

> "Sec. 2269. Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased, pre-emptor, and a patent thereon shall cause the title to inure to such heirs, *as if their names had been specially mentioned.*"

The courts have repeatedly held that where the pre-emptor had fully complied with the law and made the payment of the purchase price, he was entitled to a patent, and the issuance of the patent was a ministerial duty. After having complied with the law and paid the consideration, the equitable title vested in the pre-emptor. The issuance of the patent was imperative. The title before patent passed to the heirs by descent and not by purchase.

Writh v. *Branson*, 8 Ottor, 118.
Landes v. *Brant*, 10 Howard 348.
Carroll v. *Safford*, 3 Howard 440 and 442.
Irvine v. *Irvine*, 9 Wallace (U. S.) 617.
Cornelious v. *Kissel*, 128 U. S. 456-463.
Rozell v. *C. M. & L. Co.*, 89 S. W. 469.
Morrison v. *Faulkner*, 21 S. W. 984.
Frost v. *Missionary Society*, 22 N. W. 203.
Stoddard v. *Chambers*, 2 Howard (U. S.) 284.
Bissell v. *Penrose*, 8 Howard (U. S.) 317.
Block v. *Morrison*, 20 S. W. 340.
Spies v. *Neuberg*, 5 Am. St. Rep. 211.
Faull v. *Cooks*, 20 Am. St. Rep. 836.
Shepley v. *Cowan*, 91 U. S. 330-340.
Jackson v. *Ramsey* (N. Y.), 3 Cowen 76.
Washburn Real Property, Vol. 3, 2034, 6th Ed.
Deffenback v. *Howke*, 115 U. S. 392, 29th L. Ed. 423.
Dibble v. *Bellingham Bay Land Co.*, 163 U. S. 65-68.

Where the pre-emptor or settler died before complying with the statute and before paying the consideration or purchase price, he died without any estate, either legal or equitable and his heirs obtained nothing by descent.

Under the provisions of Section 2269, just above cited, the land formerly entered by the ancestor did not pass to his heirs by inheritance or by descent, but said heirs were given preference as new *entrymen*.

The Supreme Court of California in *Wittenbrock* v. *Wheeden*, 128 Cal. 150; 60 Pac. 664; 79 Am. St. Rep. 32, in construing Section 2269, held that the heirs did not acquire any estate or interest in the land by inheritance. The court said:

"The heirs do not take the title by descent, but the land is conveyed to them directly from the United States by virtue of the *privilege of purchase* given to them expressly by the provisions of this section. The land is not subject to devise by the pre-emptor, nor can it be sold in satisfaction of his debts or for the expenses of administration."

Section 2291 of the Revised Statutes of the United States is as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or, if he be dead, his widow; or, in case of her death, his heirs or devisee; or, in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in Section Twenty-two Hundred and Eighty-eight, and that he, she, or they will bear true allegiance to the government of the United States, then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

This statute is the homestead statute.

Section 2292 of the homestead law is as follows:

"In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the state in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose, and the purchaser shall acquire the absolute title by the purchase, and be entitled to a patent from the United States on the payment of the office fees and sum of money above specified."

The Supreme Court of the United States, in *Bernier* v. *Bernier*, 147 U. S. 242, held that these two sections must be construed together, and that where there are both minor and adult children, the right inured not solely to the minors, but to the minors and adults, but did not decide whether they took in the proportions designated by the statute of descent and distribution.

If the homesteader died before the expiration of five years from the date of the entry, he died seized and possessed of no title, either legal or equitable, and nothing therefore could pass to his heirs by descent or by inheritance. If the homesteader had resided upon the land for the five years and complied with the law he was entitled to a patent, and if he died before receiving his patent the homestead would descend to his heirs and pass to them by inheritance. He could have devised it.

Newkirk v. *Marshall*, 35 Kansas 17.
United States v. *Perry*, 45 Federal Rep. 759.
Chapman v. *Price*, 32 Kansas 446; 4 Pac. 807.
Crist v. *Cosby*, 11 Okla. 635.
McCune v. *Essig*, 122 Fed. Rep. 588.
Jarvis v. *Hoffman*, 43 Calif. 314.
Perrin v. *Ashby*, 5 Nebr. 291.
Hayes v. *Carroll*, 74 Minna. 134.
Gjerstadengen v. *Van Duzen*, 7 N. Dak. 612; 74 Pac. 50.
Towner v. *Rodegeb*, 33 Wash. 153; 76 N. W. Rep. 233.
Lewis v. *Lichty*, 3 Wash. 213; 28 Pac. 356.
Atchison R. R. Co. v. *Pracht*, 30 Kan. 66.
Kromer v. *Friday*, 10 Wash. 621.

If the homesteader failed to occupy the land for the full five years on account of death, his widow, or, in case of her death, his heirs or devisee, could prove by two credible witnesses that he, she, or they had resided upon or cultivated the same for the term of five years immediately preceding the time of filing the affidavit, and make affidavit that no portion of such land has been alienated, then, in such case, he, she, or they shall be entitled to a patent, as in other cases provided by law. This is provided by Section 2291, heretofore quoted. The heirs of such a homesteader dying before the expiration of the five years may be

entitled to take said land after having resided upon the same or cultivated the same for the term of five years, as required by Section 2291, *per capita,* in equal portions and as tenants in common. Under the pre-emption statute the heirs must pay the consideration and occupy the land as provided by the statute. If the heirs must pay the consideration and occupy the land, they necessarily bear the burdens equally, and it must follow as an equitable result that they should share the title equally, *per capita,* and as tenants in common. The same applies to the heirs taking under the homestead law as embodied in Sections 2291 and 2292 of the Revised Statutes, although I know of no decision so holding.

There is no declaration in either Section 2269 or Sections 2291 and 2292 declaring that the pre-emption entry or the homestead shall inure or descend to the heirs of the deceased *in accordance with* any particular statute of descent and distribution. The heirs take as new homesteaders and have been designated as such by the decisions.

Gjerstadengen v. *Van Duzen,* 7 N. D. 612; 74 Pac. 50.
Chapman v. *Price,* 32 Kansas 446; 4 Pac. 807.
Towner v. *Rodegeb,* 33 Wash. 153; 76 N. W. 233.

In *Bernier* v. *Bernier,* 147 U. S. 242, the Supreme Court of the United States said:

> "The object of sections in question (2291 and 2292) was, as well observed by counsel, to provide the *method* of completing the homestead claim and obtaining the patent therefor, and not to establish a line of descent, or rules of distribution of the deceased entryman's estate. They point out the conditions under which the homestead claim may be perfected, and the patent obtained, and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death."

That is not the case, however, with Sections 6 and 7 of the Supplemental Agreement. It was clearly there the purpose of Congress and the Creek Nation to provide a law of descent and distribution, and apply that law in all of its force and effect to heirs taking by descent, strictly and technically speaking, and also to

heirs taking by purchase, by substitution for and succession to a deceased child or citizen dying before receiving his or her allotment. The heirs of Andrew J. Berryhill, as the heirs of other deceased citizens dying before receiving their allotments, did not have to occupy the land in order to obtain a patent; did not have to cultivate the land in order to obtain a patent; and did not have to pay any purchase price in order to obtain a patent, all three of which things were required of heirs of entrymen, and of heirs of homesteaders. There is no reason why the heirs of Andrew J. Berryhill, although taking by purchase as donees, should take as equal tenants in common. We do not believe these sections of the Revised Statutes of the United States discussed throw any light upon this question under consideration. The California decisions are inapplicable to a construction of Sections 6 and 7 of the Supplemental Agreement.

We believe we have cited a sufficient number of cases from the best courts in the United States holding otherwise. However, before leaving this question, we desire to call the court's attention to Underhill on Wills, Volume 2, Section 623, wherein the author says:

> "It is often difficult to determine in a case of a devise to the heirs of A, when they take as purchasers, whether they take under the will in the same proportions as they would take by descent—that is, *per stirpes;* or whether they are to take as living members of a class—that is, *per capita.* The intention of the testator, whenever it is expressly stated, is controlling. If he prefers a division of property among his own heirs or the heirs of A, share and share alike, equally, in equal shares, parts or proportions, or uses other words to indicate the quality of division, those persons who are to take as heirs will be indicated by the canon law or statutory rules of descent, though the proportions which each is to take must be determined by this expression of the testator's intention."

In none of these statutes of the United States does Congress undertake to provide a law of descent, and makes no provision for inheritance where entrymen or homesteaders die seized of the equitable or legal title.

Counsel for appellant, Shulthis, say in their brief, that the Secretary of the Interior, in considering the approval of appellant's oil and gas lease, had before him this same question, and in approving the lease to appellant, gave his decision to the effect that the father, George Franklin Berryhill, was the sole heir. We do not desire to question the veracity of the distinguished counsel for appellant, but we desire to deny this statement. The truth is, the secretary never discussed this question, and never rendered any opinion, but, in fact, approved the lease upon the theory that the Creek law of descent and distribution was in force at the time of the death of Andrew J. Berryhill, which, if true, that is, if the Creek law was in force, the father and mother (or the mother) were the sole heirs. We are, however, informed by reputable attorneys at the Muskogee bar that a similar question was before the secretary, and that a lease was approved to their clients upon the theory that the heirs taking by purchase took in the same manner as if they had technically taken by descent—that is, that the parents took nothing further than a life estate. No opinion, however, was written in the case, and insofar as we know, the Secretary of the Interior nor his subordinates have ever written any opinion on the point involved. It has been the policy of the Secretary to leave these matters to the courts.

We believe the intention of the lawmakers is absolutely obvious by the wording of Section 6 and Section 7 of the Supplemental Agreement, wherein it is expressly provided that the lands "*shall descend* in accordance with Chapter 49 of Mansfield's Digest," etc. We believe that the decisions and the logic of the question are with us on this proposition. We confidently contend that we must look to the Arkansas statute to determine two things:

First. Who the heirs are.

Second. What share and proportion the heirs take.

Not only that, but in looking to the Arkansas statute of descent, we must decide the question and fix the rights "in accordance with Chapter 49 of Mansfield's Digest," just as if Andrew J. Berryhill had died the owner of said land.

With this settled, let us turn to Chapter 49 of Mansfield's Digest of the Statutes of Arkansas and ascertain who the heirs are and what interest and estate they take.

Chapter Forty-nine, Mansfield's Digest.

(1) "Section 2522. When any person shall die, having title to any real estate of inheritance, or *personal* estate, (b) not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred, male and female subject to the payment of his debts and the widow's dower, in the following manner:

First. To children or their descendants, in equal parts.

Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.

Third. If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts.

(10) Section 2531. In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this Act; and in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided (d).

(11) Section 2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation.

(12) Section 2533. Relations of the half-blood shall inherit equally with those of the whole blood in the same degree; and the descendants of such relatives shall inherit in the same manner as the descendants of the whole blood, unless the inheritance come to the intestate by descent, devise or gift, of some one of his ancestors, in which case all those who are not of the blood of such ancestor shall be excluded from such inheritance.

(13) Section 2534. In all cases not provided for by this act, the inheritance shall descend according to the course of the common law.

(14) Section 2535. Whenever an inheritance, or a share of an inheritance, shall descend to several persons, under the provisions of this act, they shall inherit as tenants in common, in *proportion* to their respective shares or rights.

Construction.

(19) Section 2540. The term 'real estate,' as used in this act, shall be construed to include every estate, interest and right, legal and equitable, in lands, tenements and hereditaments, except such as are determined or extinguished by the death of the intestate, seized or possessed thereof in any manner, other than by lease for years and estate for the life of another person.

(20) Section 2541. The term 'inheritance,' as used in this act, shall be understood to mean real estate, as herein defined, descended according to the provisions of this act.

(21) Section 2542. Whenever, in any part of this act, any person is described as living, it shall be understood that he was living at the time of the death of the intestate from whom the descent came; and, when any person is described as having died, it shall be understood that he died before the intestate.

(22) Section 2543. The expression used in this act, 'where the estate shall have come to the intestate on the part of the father,' or 'mother,' as the case may be, shall be construed to include every case where the inheritance shall have come to the intestate by gift, devise or descent from the parent referred to, or from any relative of the blood of such parent" (Rev. Stat., Chap. 49).

Counsel for complainant contend that the court should read the first section under this chapter—that is, section 2522, above set out, and there stop; that the heirs are here nominated, and that the court should proceed no further than this section.

We propose to demonstrate that it is utterly impracticable and absolutely futile to undertake to stop with this section of the statute. We contend in behalf of the defendants that the statute must be looked to and applied just as if Andrew J. Berryhill had died the owner of the land in controversy and seized of an estate such as would descend by inheritance to his heirs.

Having demonstrated, as we believe, that the court must look to the statute for two things—that is, who the heirs are, and their portions, let us examine this section 2522 and see what it means.

Section 2522 and Section 2531, as well as the entire Chapter 49, were repeatedly construed and interpreted by the Supreme Court of Arkansas long before Chapter 49 was put in force in the Indian Territory and long before the Supplemental Creek Agreement (Sections 6 and 7), provided that the descent and distribution should be in accordance with Chapter 49 of Mansfield's Digest of the Laws of Arkansas.

The construction of the various sections of the Arkansas laws of descent, given by the Supreme Court of Arkansas, was recognized by the bench and bar in the Indian Territory as controlling and binding in the construction of said statutes. The bench and bar gave full faith and credit to the various decisions of the Supreme Court of Arkansas (which, by the way, are entirely harmonious), construing said statutes, and a great many estates were wound up and settled on the assumption that the construction of the Arkansas laws by the Supreme Court of that state had been carried by implication into the general jurisprudence of the Indian Territory.

The bench and bar were justified in this assumption. A long line of decisions by the United States Court of Appeals in the Indian Territory, the United States Circuit Court of Appeals for the Eighth Circuit, as well as a decision of this court, fully author-

ized and justified the bench and bar in the Indian Territory in conclusively assuming that the construction of the Arkansas Statutes by the Supreme Court of that state was binding on the courts having jurisdiction over affairs involving questions of descent in the Creek Nation.

This court, in *Robinson & Co.* v. *Belt*, 187 U. S. Rep. 47; 47 L. Ed. 65, in discussing the construction to be given to certain Arkansas Statutes put in force in the Indian Territory, said:

> "Whatever might be our own views with regard to the validity of a release by creditors as a condition of preference under an assignment, the question is one which, upon the authorities above cited, must be held to be determinable by the state law as interpreted by the Supreme Court of such state.
>
> "While the case under consideration arose in the Indian Territory, the law applicable thereto is determined by the laws of Arkansas, which were adopted and extended over the Indian Territory by the act of Congress approved May 2, 1890 (26 Stat. at L., 94, par. 31), which declares that certain general laws of Arkansas, 'which are not locally inapplicable, or in conflict with this act, or with any law of Congress relating to the subjects specially mentioned in this section, are hereby extended over and put in force in the Indian Territory,' among which laws are enumerated assignments for the benefit of creditors and the statute of frauds. *In adopting this law with respect to assignments, the courts of the Indian Territory are also bound to respect the decisions of the Supreme Court of Arkansas interpreting that law.*
>
> "In more than one case we have had occasion to hold that, if a foreign statute be adopted in this country, the decisions of foreign courts in the construction of such statute should be considered as incorporated into it. Thus, in *Pennock* v. *Dialogue*, 2 Pet. 1, 7 L. Ed. 327, it was said by Mr. Justice Story (p. 18, L. Ed. p. 333): 'It is doubtless true, as has been suggested at the bar, that where English statutes, such, for instance, as the statute of frauds and the statute of limitations, have been adopted into our own legislation, the known and settled construction of those statutes by courts of law has been considered as silently incorporated into the acts, or has been received with all the weight of authority.'

In speaking of our patent act, which was largely taken from the English statute of monopolies, he says (p. 20, L. Ed., p. 334): 'The words of our statute are not identical with those of the statute of James, but it can scarcely admit of doubt that they must have been within the contemplation of those by whom it was framed, as well as the construction which had been put upon them by Lord Coke.' In *Cathcart* v. *Robinson*, 5 Pet. 264, 8 L. Ed., 120, Mr. Chief Justice Marshall said (p. 280, L. Ed., p. 126): 'By adopting them (British Statutes), they become our own as entirely as if they had been enacted by the legislature of the state. The received construction in England at the time they are admitted to operate in this country, indeed, to the time of our separation from the British Empire, may very properly be considered as accompanying the statutes themselves, and forming an integral part of them. But, however we may respect subsequent decisions—and certainly they are entitled to great respect—we do not admit their absolute authority.' See also *Kirkpatrick* v. *Gibson*, 2 Brock. 388, Fed. Cas. No. 7,848. The same rule has been applied in the state courts in the construction of statutes adopted from other states. *Com.* v. *Hartnett*, 3 Gray, 450; *Tyler* v. *Tyler*, 19 Ill. 151; *Bloodgood* v. *Grasey*, 31 Ala. 575; *Marqueze* v. *Caldwell*, 48 Miss. 23; *State* v. *Robey*, 8 Nev. 312; The Devonshire, 8 Sawy. 209, 13 Fed. 39."

To the same effect, see the following decisions of the courts in this jurisdiction:

Sanger v. *Flow*, 48 Fed. Rep. 152.
Blaylock v. *Incorporated Town of Muskogee*, 117 Fed. Rep. 125.
McFadden v. *Blocker*, 2 Ind. Ter. 260; 48 S. W. Rep. 1043; 58 L. R. A. 878.
Blaylock v. *Incorporated Town of Muskogee*, 4 Ind. Ter. 43; 64 S. W. Rep. 609.
Boyt v. *Mitchell*, 4 Ind. Ter. 47; 64 S. W. Rep. 610.
Zufall v. *United States*, 1 Ind. Ter. 638; 43 S. W. Rep. 760.
Randolph v. *United States*, 1 Ind. Ter. 705; 43 S. W. Rep. 1098.
Carter v. *Barton*, 2 Ind. Ter. 99; 48 S. W. Rep. 1017.
Le Bosquet v. *Myers*, 103 S. W. Rep. 770 (I. T.).
J. B. Bostic Co. v. *Eggleston*, 104 S. W. Rep. 566 (Ind. Ter.).
Western Investment Co. v. *Davis*, 104 S. W. Rep. 573 (Ind. Ter.).

Armed with the above authorities, our right to resort to the Arkansas decisions for the interpretation of the Arkansas Statutes involved is conclusive, and we contend that the construction of these statutes by the Supreme Court of Arkansas, prior to the Supplemental Creek Agreement of 1902, is conclusive and binding on the United States Courts and the courts of the State of Oklahoma.

These decisions of the Supreme Court of Arkansas to be cited established a rule of property in the Creek Nation, and that rule of property is as firmly established and binding in this jurisdiction as in the State of Arkansas. It is a firmly established rule of property. Let us, therefore, turn to the Arkansas decisions which have construed this statute repeatedly. None of these decisions establish or support the argument of counsel for the plaintiff, or the decision of the Court of Appeals on this branch of this case.

The Supreme Court of Arkansas in 1855, in the celebrated case of *Kelly* v. *McGuire*, 15 Ark., 582, construed this section and the whole chapter. The construction placed upon the law of descent and distribution in that decision has been uniformly adhered to by the Supreme Court of Arkansas down to the present, and has been cited and approved and applied and followed in not less than fifteen decisions of the Supreme Court of that state. We insist that under the construction of section 1 of this chapter by the Supreme Court of Arkansas, uniformly adhered to, the section must be read *in conjunction with section* 10—that is, section 2531, heretofore quoted, of Mansfield's Digest. We insist and shall show by the decisions of the Supreme Court of Arkansas, that in the absence of *descendants*, it becomes absolutely material and necessary to determine first: The source from whence the estate came before the heirs in the ascending line can be nominated, and their shares and portions fixed and determined. In other words, the Supreme Court of Arkansas has expressly decided in numerous decisions that the father and mother are not heirs—that is, they cannot take real estate under section 1 of the chapter, unless the estate is *either ancestral or a new acquisition*. Although the estate may be ancestral the father is not an heir unless the estate

came to the deceased from the father's side—that is, unless "the estate come by the father," or from the father's side of the house. If the estate come by the mother, the father took absolutely no estate by inheritance. If the estate was a new acquisition, only a life estate. So far as the personal property is concerned, it is immaterial from whence the property was derived or from what source it came to the deceased. But it is different with real property; it is immaterial, insofar as real property is concerned, as long only as there are *descendants*, but in the absence of *descendants*, it becomes absolutely necessary to determine the source from which the estate came to the deceased.

Counsel for plaintiff contend that Andrew J. Berryhill never had any title to the land in controversy during his lifetime, and that it necessarily follows that the property was not a *new acquisition*. As heretofore said, that is technically correct. But Andrew J. Berryhill, not having been seized of any estate in the property at the date of his death, the conclusion equally follows that the estate was not ancestral. But if he had died seized of the allotment it would have been either a new acquisition or ancestral, one or the other.

Let us first examine the celebrated case of *Kelly* v. *McGuire*, 15 Ark. 582.

In discussing section 1, out of which we contend the father is carved as an heir by section 10, the Supreme Court of that state said:

> "The first section is general and comprehensive, embracing all lands, whether ancestral or newly acquired, *subject to certain exceptions and qualifications*, hereafter more particularly noticed, and these exceptions refer to *real estate alone*. This section also constitutes the table, by which real estate is to descend and personal property to be distributed. As, by its express language, it relates to both real and personal property, it was manifestly the design of the legislature, when there were *descendants* of the intestate, to send down both to them *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to *how the property has been acquired*."

We wish to impress upon the court the importance of preserving this distinction—that is, the fact as to how the property had been acquired is not material as long as there are *descendants* to take the estate; otherwise when we turn to the *ascending* line.

The court in this decision further said in this same connection:

> "And as to personal property, where there are no descendants of the intestate to distribute it to, *collaterals* will take in the same way as *descendants*, if there had been any; that is to say, without any inquiry as to how it was acquired, and, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree. This was manifestly the design of the legislature. The sections of the statute which have reference to both real and personal property, and expressly name or allude to both, or embrace them in their spirit, are the first, fourth, fifth, fifteenth, sixteenth, seventeenth, and eighteenth. The fifteenth, sixteenth, seventeenth and eighteenth touch the subject of advancement. And, to attain the object in view, it was necessary to blend real and personal property together; because the amount received is the inquiry; and, whether in land or personal property, produces the same result."

The court further said:

> "The effect of the first section is, to constitute the persons, who take the personal property, whether *per capita*, or *per stirpes*, and whether of the *whole* or *half*-blood, the absolute owners. Nor is it *material*, whether those persons are the paternal or maternal, or the lineal or collateral line. By that section, as already remarked, real and personal estate goes in the same channel, and *if no subsequent provisions had been* introduced, touching *real estate*, the precise bearing of which, it is probable the rivers did not perceive, our labors would have been comparatively easy. At present, nothing further need be said as to personal property, as we shall find it necessary to allude to that hereafter, and shall now speak in reference to real estate."

The court then goes ahead to explain and carve out the exceptions and qualifications in the following language:

"The effect of the first section, subject to the *exceptions* and *qualifications* alluded to, is to vest an absolute estate of inheritance in lands in the person who takes. And every estate, interest and right, legal and equitable, in lands and tenements and hereditaments, excepting only leases for years, and estates for the life of another person, are thus inheritable and descendable; or, as the first section expresses it, 'having title to any real estate of inheritance,' constitutes an inheritable estate, thus abolishing the common law doctrine, derived from feudal times, of actual seizin in the ancestor."

Further:

"We pass now to the more particular consideration of the tenth section. The manifest intention of the first part of this section, was to preserve ancestral estates in the line of the blood from whence they came. It was a partial adoption or recognition of the common law principle, which invariably followed the line of the blood. If the estate comes to the intestate by the father, or as it may be differently, and as well expressed, on the part of the father, then it must ascend to the father and his heirs, and thus overturning the inflexible rule of the common law, that an estate could never ascend; but should rather escheat to the lord. And so, if it comes by or on the part of the mother, it goes to the mother and her heirs in *exclusion* of the heirs of the father. In other words, it remains in the paternal or maternal lines, from whence it was derived."

The court then says:

"The tenth and twenty-second sections must be construed together, although the exact expressions used in the latter, are not contained in any part of the statute. But words of equivalent signification are employed, and they are embraced within the spirit of the twenty-second section. The expression, then, '*come by the father or mother,*' is not limited to an estate acquired by descent merely, but includes an estate which comes to the intestate by gift, devise or descent from the parent referred to, or from any relation of the blood of such parent. Such is the letter and spirit of the statute. In other words, there are two classes of cases provided for: One, where the blood of the person, from whom the descent came,

whether it be by descent, devise or gift, is *regarded;* and the other, where the blood of the intestate forms the stirps, or stock of descent, without respect to ancestral blood.

Chancellor Kent says there is a difference in the laws of the several states, between the succession to estates, which the intestate had acquired in the course of descent, or by purchase. 'If the inheritance,' says he, 'was ancestral, and came to the intestate by gift, devise or descent, it passes to the kindred, who are of the blood of the ancestor from whom it came, whether in the paternal or maternal line.' "

In the above the Supreme Court of Arkansas has defined an ancestral estate and construed the words of the statute contained in Section 10. It is obvious that the land in controversy was not an ancestral estate. The father could not inherit the fee under the Arkansas statute, except in one event and two things must concur in order to give the father the fee under Chapter 49 of Mansfield's Digest, and these are as follows:

FIRST.

The estate must have been ancestral—that is, it must have come to Andrew J. Berryhill, "by gift, devise or descent;" and,

SECOND.

Such gift, devise or descent must have been from the *father* or "from any relation of the blood of such parent."

Section 1 of Chapter 49 of Mansfield's Digest, under the decisions of the Supreme Court of Arkansas, insofar as *real estate* is concerned, must be construed with section 10 of the chapter which furnishes the "exceptions and qualifications" alluded to by the court in its decision above quoted and the other decisions hereafter to be quoted. Were the estate ancestral, the father would not be an heir if it was derived by the intestate "by gift, devise or descent from the mother or from any relation of the blood of the mother." Being ancestral alone is not sufficient. The court must go further and determine from whence the estate was derived before the father can be declared and adjudged an heir to the fee in the estate.

Insofar as the personal property is concerned, whether it was a new acquisition or ancestral, is entirely immaterial. In further discussing the question of what estate the father would take, the court in this celebrated case said:

> "The portion of section 10, as to *new acquisitions*, gives the father and mother a life estate only, with the remainder to the collateral heirs of the intestate; such as brothers and sisters and their descendants, and so on. A new acquisition, or newly acquired estate, does not afford, of itself, an exact idea of the mode of acquisition. By the common law, there were two modes of acquiring an estate—distinguished by the general appellations of descent and purchase. In the first, it was by operation of law; in the second, by act or agreement of parties. Devises and gifts fall in the latter class. An estate by purchase there became inheritable to the heirs general of the purchaser, first of the paternal, and then of the maternal line.
>
> It must be understood, however, that a new acquisition, in the sense intended by the statute, is one which the intestate has acquired by his exertions and industry, or by will or *deed from a stranger. In other words, it is an estate derived from any source other than descent, devise or gift, from father or mother, or any relative in the paternal or maternal line.*
>
> If the son should purchase land from the father or mother, for a valuable consideration, it would be a new acquisition, and descend as such; because nothing is received by way of *bounty* at the hands of ancestors, which is the case as to lands descended from, or devised, and it was thought reasonable that they should remain in the blood from which they came.
>
> Land is to be considered as having come from, or by, or on the part of, the father or mother, when it comes by gift, devise or descent, either mediately or immediately from them or from any person in their respective lines."

After having fully reviewed the statutes, the court says:

> "Our statute provides for ancestral and newly acquired inheritances."

It then epitomizes the statute in the following paragraphs, numbering each:

First. That, as to both real and personal property, it was the design of the legislature, when there were *descendants* of the intestate, to send down both to them, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, without any regard to the fact as to how the estate was acquired.

Second. That, as to *personal property*, it was the design, where there were no descendants, that it should go to collaterals in the same way it would have gone to descendants, if there had been any; that is to say, *per capita*, if in equal degree, and *per stirpes*, if in unequal degree, and without inquiry as to how the property was acquired by the intestate.

Third. That as to real estate, it was the design of the legislature, where there were *no descendants*, to point out the lines of the succession, *and that this is to depend on the fact, whether the inheritance is ancestral or new;* and, if ancestral, then whether it come from the paternal or maternal line.

Fourth. If the inheritance was ancestral, and come from the father's side, then it will go to the line on the part of the father, from whence it came, not in postponement, but in exclusion, of the mother's line; and so on the other hand, if it come from the mother's side, then to the line on the part of the mother, from whence it came, to the exclusion of the father's line.

Fifth. If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncles and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts, and their descendants; unless there should be kindred, lineal or collateral, who, either in right of propinquity, or by right of representation, stand in a nearer relation to the intestate than the uncles and aunts; in which case, such nearer kindred would take the inheritance to the exclusion of both of these collateral lines; and, in their hands, it would become an ancestral estate, and always go in the blood of the relative from whence it came, in the ordinary course of descent prescribed for ancestral inheritances.

Sixth. That, when the inheritance is fixed, by these facts, *in any given line, it will pursue that line until it becomes extinct,* and the objects of bounty, and the order in which they succeed one another, and the proportion they take, are to be ascertained by the first section, which is to be considered as the general table of descent. The father, mother, brothers, sisters, and so on, mentioned in that section, are those who are to be considered when counting from any propositus, whether the propositus of a single line only, or the concurrent propositus of both lines, as the intestate, is *as to personal property.*

Seventh. In all cases where the inheritance is in any one line, if there goes in succession, *per capita,* if in equal degree, and *per stirpes,* if in unequal degree, precisely as if the other line was extinct, and precisely as the inheritance of a bastard would take a course in his mother's line, he having no father's line at all.

Eighth. The half-blood and their descendants take personalty, as well as realty, equally with the whole-blood, except that they are excluded from real estate when ancestral, if they lack the blood of the transmitting ancestor.

We call especial attention to the third paragraph wherein the court clearly and expressly says:

> "That as to real estate, it was the design of the legislature, where there were no *descendants,* to point out the lines of succession, and that this is to *depend* on the fact, whether the inheritance is *ancestral* or *new;* and, if ancestral, then whether it come from the paternal or maternal line."

Both of the lower courts held that we must resort to the Arkansas Statutes in this case, although the allotment was made to the heirs for the same purpose resort is had to the Statute [illegible] case where the allottee died seized and possessed of his allotment. In other words, both courts held, correctly, that we must resort to the Arkansas Statute for two things, just as we insist: First, to determine whom the heirs are, and, second, what shares and portions they take.

The Court of Appeals, however, decided contrary to the decision of the trial judge, that the allotment was not a new acquisition

but ancestral. Assuming that the land has been allotted to Andrew J. Berryhill during his life-time, and assuming that he died seized and possessed of the title therein, we contend that the estate did not come to him by gift, devise or descent, from either ancestor or from a relative by blood of either ancestor. The holding of the Court of Appeals, that the estate was ancestral, is not supported by a single decision of any court and is in absolute opposition to the *decisions* of the Supreme Court of Arkansas.

Even counsel for appellant did not, before either of the lower courts, insist that the allotment was ancestral. Their contention has at all times been that the allotment in this particular case having passed by purchase to the heirs, and not by descent, we can resort to the Arkansas Statutes of Descent for only one purpose, to-wit—to determine whom the heirs are. Counsel have never contended until they reached this court that the estate was ancestral, and we believe, from an examination of their brief, the inference can well be drawn that they do not now believe that the Court of Appeals was correct in holding that the allotment was ancestral and not a new acquisition.

The inherent error in the position of the Court of Appeals lies in its reluctance to accept the Arkansas Statute as being in *full force and effect* under the Creek Supplemental Agreement. The Court of Appeals said, in regard to the Arkansas Statute:

> "This statute makes provision for all possible acquisitions of real property for the civilized white community whose estate it was intended to cover. And among the people of Arkansas there was no way of acquiring land except by grant, gift or inheritance. This was true even of lands acquired from the Federal Government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a moment's thought to see that when this statute was applied to the lands of the Creek Nation, it was applied to a subject-matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the

> statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase."

Chapter 49 of Mansfield's Digest was, however, unreservedly and unconditionally placed in force in the Creek Nation by the Creek Tribe and the United States. There is no provision in the treaty putting Chapter 49 of Mansfield's Digest in force *insofar as applicable*. Chapter 49 should be treated and construed as if set out at large in the Supplemental Agreement, word for word—set out *in haec verba*.

The United States Circuit Court of Appeals for the Eighth Circuit, in discussing sections of Mansfield's Digest put in force in Indian Territory by Act of Congress, said:

> "Section 3061 of Mansfield's Digest, is the law of the Indian Territory, just as much as if it had been enacted by Congress, *in haec verba*. It is a mistake to suppose that Chapter 60 containing the section in question, is to be treated in the Indian Territory as the Arkansas Statute, as would be the case if the question should arise under it in the Circuit Court of the United States for the District of Arkansas. In the Indian Territory it is the *Act of Congress*, and has the same force and effect as if it had been originally adopted by Congress without any reference to its prior existence in the State of Arkansas."
>
> *Leak Glove Mfg. Co.* v. *Needles*, 69 Fed. Rep. 69.

The mistake the Court of Appeals made in this case, with respect to the Arkansas Law of Descent, is the mistake in treating Chapter 49 as Arkansas law and not Federal law. In other words, in considering this case, we should read the Statutes of Arkansas as if they were made a part of the Statutes at Large of the United States, or set out at large in the Supplemental Creek Agreement. It is not for the courts to declare said Arkansas Statutes a misfit or to find that they are not well adapted to the condition of affairs in the Creek Nation. Those were matters addressing themselves entirely to the United States and the Creek Tribe. Both parties to the Supplemental Agreement unreservedly declared that allot-

ments should descend in accordance with Chapter 49 of Mansfield's Digest, and, under Chapter 49 as repeatedly construed by the Supreme Court of Arkansas prior thereto, the father was not an heir and could not inherit unless the allotment was either ancestral or new, and could not inherit the allotment on the ground that it was ancestral unless the allotment had been derived by the deceased allottee by gift, devise, or descent, from the father or a relative by blood on the father's side.

The holding that the allotments in the Creek Nation were ancestral is the result of an acute refinement not perceptible or conceivable by the bench and bar in the Indian Territory, or the State of Oklahoma, until the decision of the Court of Appeals in this case.

In *Cherokee Nation* v. *Hitchcock*, 187 U. S. Rep. 294-299, 47 L. Ed. 184, this court said:

> "Whatever title the Indians have is in the Tribe and not in the individuals, although held by the Tribe, for the common use and equal privilege of all the members."

With respect to the power of Congress to confer upon the Secretary of the Interior authority to execute mineral leases upon the domain of the Cherokee Nation, this high court said in the above cause:

> "There is no question involved in this case as to the taking of property; the authority which it is proposed to exercise by virtue of the Act of 1898, has relation merely to the control and development of the tribal property which still remains subject to the control of the Government, even though the members of the tribe have been vested with the status of citizens under recent legislation."

In *Delaware Indians* v. *Cherokee Nation*, 193 U. S. Rep. 129-146, 48 L. Ed. 646, this court, speaking through Mr. Justice Day, said:

> "The lands of the Cherokee Nation are not held in individual ownership, but are public lands, though held for the equal benefit of all the members. *Stephens* v. *Cherokee*

Nation, 174 U. S. Rep. 445, 488; *Cherokee Nation* v. *Hitchcock*, 187 U. S. Rep. 295. Under the patent issued to the Cherokees for their lands, whatever title conveyed was to the Cherokees as a nation, and no title was vested in severalty in any of the Cherokees."

See also *Cherokee Nation* v. *Journeycake*, 155 U. S. Rep. 196-207, 39 L. Ed. 120-124.

In *Eastern Band of Cherokee Indians* v. *United States and Cherokee Nation*, 117 U. S. Rep. 288-312, 29 L. Ed. 881-887, this court said:

> "The lands from the sale of which the proceeds were derived, belonged to the Cherokee Nation as a political body and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common *that he could claim a pro rata proportion of the sales made of any part of them.* He had a right to use parcels of the land thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to *cede the lands and the title* of the Nation to the United States. Our Government by its treaties with the Cherokees recognized them as a distinct political community, and so far independent as to justify and require negotiations with them in that character."

In *Ligon et al.* v. *Johnston et al.*, 164 Fed. Rep. 670, decided by the United States Circuit Court of Appeals for the Eighth Circuit on September 30, 1908, the court had under consideration the precise point involved in this discussion, that is, did a citizen have any vested right in the common property of the tribe? The complainant in that case, Bettie Ligon, on behalf of herself and several hundred others alleged to be similarly situated, contended that she was a citizen of the Choctaw Nation by blood; and that she and the others in whose behalf the suit was instituted, had vested rights in the domain of the Choctaw Nation under the Treaty of 1830, which provided that the United States, under

a grant specially to be made by the President "shall cause to be conveyed to the Choctaw Nation a tract of country west of the Mississippi River, in fee simple, to them and *their descendants,* to inure to them while they shall exist as a Nation, and live on it." Patent was thereafterwards issued by the United States reciting this provision of the treaty.

The complainants in that case claimed that they were erroneously placed upon the Freedman rolls and limited to an allotment of forty acres, whereas, they were in fact citizens by blood and entitled to a larger participation in the lands and property of the tribe. Special emphasis was placed by counsel for the complainants upon the provisions of the treaty and the patent, wherein the land was conveyed to the Choctaw Nation "in fee simple to them and *their descendants,* to inure to *them* while they shall exist as a Nation and live on it."

Judge Hook says:

> "That the lands involved were public lands belonging to the Choctaw and Chickasaw Nations and not to the individual members has been assumed without contradiction from the inception of their titles through a long sequence of Acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is so only in the broad, comprehensive sense in which the public property of any representative government is in trust for the welfare of its people. *Until specific, private, individual rights attach pursuant to law, the enforcement of such trusts must be at the bar of public conscience. They are not justiciable in the courts. The disposition of the tribal property of the Indian tribes falls within the legislative domain, the power of Congress is supreme, and its action is conclusive upon the courts.*"

Judge Hook further says:

> "In *Stephens* v. *Cherokee Nation,* 174 U. S. 488, it was said that the lands and moneys of the Indian Nations then before the court were public lands and moneys, and the Acts of Congress relating to the determination of citizenship could not be successfully assailed on the ground of the impairment

or destruction of vested rights; and the court was then speaking of the title of the Choctaws and Chickasaws as well as of that of the Cherokees. Whether complainants should be enrolled as citizens of the Indian Nations *is a political or administrative question, and none the less so because upon its determination depends the measure of their participation in the tribal property.*"

The title was in the Creek Nation as a political society, with a contingent remainder in the United States. To whom the land should be allotted rested entirely with these two sovereign powers. The dictum of the Court of Appeals in this Shulthis case "that its ownership as a political society could no longer continue, and the division of its property was far more nearly akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner," when the time came to disband the tribe, is not supported by the very recent opinion of this court in *Fleming* v. *McCurtain,* 215 U. S. 56. That case was very similar to the case of *Ligon* v. *Johnson, supra,* and the contention of the plaintiffs in that case is thus stated by Mr. Justice Holmes:

> "The plaintiffs say that the patent conveyed the legal title to the Choctaw Nation in trust for such persons as were members of the tribe at the date of the treaty, or of the Chickasaw tribe at the date of the treaty with them, and their respective descendants, and that upon the dissolution of the nation the legal title merged with the equitable title, and the designated class became the absolute owners of the property as tenants in common.
>
> "The plaintiffs, in aid of their view, refer to various indications that the policy of the United States already was looking toward the disintegration of the Indian tribes, point out that the words on which they rely were interlined in the Government draft at the instance of the Indians, and from these and other circumstances argue that their construction is confirmed. They say that the dominant phrase is 'in fee simple to them and their descendants,' and that the use of the plural 'them' shows a transition from the Nation as formal grantee to the members as beneficiaries. They say that 'descendants' was used instead of 'heirs' or 'children' to avoid

questions of legitimacy, or giving an absolute title to living members and their children, and to establish a principle of devolution suitable to the mode of life and unions in those Indian tribes. They conclude that the words 'inure to them while they shall exist as a nation and live on it,' only mark the duration of the legal title and do not cut down the equitable right conferred by the earlier words."

With that contention this court did not agree, and said:

"What we have said shows another sufficient answer to the plaintiffs' claim. They say and argue, as they must, in order to make out their right to a distribution to themselves, that the Choctaws and Chickasaws no longer exist as Nations. *But if so, the grant also was at an end when the nations ceased to be, and it rested with the bounty of the United States to decide what should be done with the land,* except so far as it already had been decided by treaties or statutes upon which the plaintiffs do not and cannot rely."

This court in this Fleming case expressly repudiated the contention that the members of the tribes or their heirs held the title in common, and expressly disagrees with the theory expressed by Judge Amidon in this case to the effect that upon the dissolution of the tribal government, the title, at least in a qualified sense, passed to the individual members of the tribe. This court says with respect to the argument that the dissolution of the tribal government operated to pass the title to the citizens and members of the tribe that instead of such being the case,

"the grant was also at an end when the Nation ceased to be, and it rested with the bounty of the United States to decide what should be done with the land."

There can be no doubt that the power possessed by the Creek Nation and the United States to allot the lands, carried with it the power to name the allottees. Also the power to allot certain portions of the domain in the names of deceased members carried with it the power to name and nominate the beneficiaries of the grant or donation.

It seems to us that our contention is well sustained by the opinion of Judge Sanborn, speaking for the Court of Appeals, in the case of *Hayes* v. *Barringer*, 168 Fed. Rep. 221. In that case Sarah Hayes St. John, in July, 1903, being a full-blood Chickasaw Indian, and duly *enrolled* and entitled to an allotment under the Act of June 28, 1898, ratifying the Atoka Agreement, and also under the provisions of the Supplemental Agreement made with the Choctaws and Chickasaws in 1902, made a will devising all her property to one Ida Hayes. Said Sarah Hayes St. John died after the making of this will, but before any allotment had been selected or set apart to her. After her death her administrator selected an allotment and the contest arose between the devisee under the will, and the heirs of Sarah Hayes St. John. The court held, that at the time the will was made the testator had the right to dispose of all her devisable property, by will, in accordance with the laws of the Chickasaw Nation, but however, that the devisee took nothing by the will, inasmuch as the testator had *no devisable interest in the land in controversy, or any other lands in the Chickasaw Nation*, at the time she died in the year 1903, although she was a duly enrolled citizen by blood of the Chickasaw Nation, and entitled to an allotment under the provisions of the Atoka Agreement, approved in 1898, and also the Supplemental Agreement approved in 1902.

Judge Sanborn says:

> "But was the interest of this Chickasaw Indian in these lands devisable in 1903? At that time these were the lands of the Choctaw and Chickasaw Nations, held by them, as they held all their lands, in trust for the individual members of their tribes, in the sense in which the public property of representative governments is held in trust for its people. But these were public lands, and, while the enrolled members of these tribes undoubtedly had a vested equitable right to their just shares of them against strangers and fellow members of their tribes, *they had no separate or individual right to or equity in any of these lands which they could maintain against the legislation of the United States or of the Indian Nations.*"

With these decisions and the doctrine established let us turn back to the Arkansas decisions construing Chapter 49.

The fourth paragraph of the epitome by the court in *Kelly* v. *McGuire,* is worthy of attention, and the fifth, as well. In the fifth paragraph the court clearly and explicitly says: "If the inheritance be not ancestral, but a new acquisition, then, after a life estate, reserved in succession to the father and mother, if alive, it will go in remainder, first to the line of the intestate's paternal uncles and aunts, and their descendants, in postponement of the mother's line, until the former becomes extinct; and then to the line of the intestate's maternal uncles and aunts," etc.

Under this decision, as well as the others of the Supreme Court of Arkansas, we therefore insist that the uncles and aunts of Andrew J. Berryhill, to-wit, the brothers and sisters of George Franklin Berryhill, the father, inherited the fee, or took the fee in the land in controversy. The mother is excluded by Section 6 of the Supplemental agreement made in 1902, because she is not a citizen of the Creek Nation, and the uncles and aunts upon her side of the house are excluded for the like reason, as well as by the decision in this case of *Kelly* v. *McGuire.*

We therefore insist that D. A. McDougal is the owner of the fee to the land in controversy by the deed executed to him by the uncles and aunts of Andrew J. Berryhill, deceased.

It is argued by complainant's counsel that the land in controversy, not having been set apart to *Andrew J. Berryhill* during his lifetime, it was consequently not a new acquisition; that he did not acquire it by purchase, by his own industry, or by deed or gift from a stranger. This is true. The situation, therefore, presented is anomalous. In this particular estate was neither ancestral nor a new acquisition. How then is the inheritance to be ascertained? *We offer the only reasonable, the only practicable, and the only feasible solution of the problem.* Our solution is the only possible one, and that is this: How would the estate have been inherited if Andrew J. Berryhill had died the owner of the land? We believe we have demonstrated conclusively in this argument that it was the intention of Congress and the Creek Nation to make no distinction and no difference between heirs taking by purchase, and heirs taking, technically, by descent. If the land had been allotted to Andrew

J. Berryhill during his lifetime, and he had died its owner, then the conclusion necessarily and conclusively follows that it was a *new acquisition*, not an ancestral estate, and therefore nothing farther and nothing greater inured to the father than a life estate. It is impossible to adjudge him the owner under Section 1 of Chapter 49 of Mansfield's Digest, because Section 10 furnishes the "exceptions and qualifications" mentioned by the Supreme Court of Arkansas in the case of *Kelly* v. *McGuire*, wherein the court held that Section 10 carved the father out of Section 1, in as far as the real estate is concerned, and eliminated him as an heir, except in two instances: First, the estate must have been ancestral, and, in addition to being ancestral, come by the father or a blood relation of the father, in which event he would take the fee; and second, the estate must have been a new acquisition, in which event the father would take merely the life estate, with the fee passing directly to the uncles and aunts on the father's side.

If this land had been allotted to Andrew J. Berryhill during his lifetime he would have acquired title thereto by gift, or donation, from the Creek Nation and the United States. It was the same as a deed from a stranger. There is not the slightest doubt but that it would have been a new acquisition. The courts and bar in general in the Indian Territory have held that allotments were new acquisitions. The Supreme Court of Arkansas in *Hogan* v. *Finley*, 11 S. W., 1035, in the year 1889, held that public land entered by a settler and the title acquired by him was a new acquisition, and upon his death the father acquired nothing farther than a life estate therein. The court said:

> "The land in controversy was a new acquisition by Thomas V. Taylor, and upon his death it passed, first, to his father, and then to his mother, for life."
>
> *Hogan* v. *Finley*, 11 S. W. 1035.

The decision in *Kelly* v. *McGuire*, 15 Ark. 582, extensively quoted from above, has been repeatedly reaffirmed and adhered to by the Supreme Court of Arkansas, as shown by the following cases:

Scull v. *Baugine*, 15 Ark. 698.
Galloway v. *Robinson*, 19 Ark. 399.

Magness v. *Arnold,* 31 Ark. 103.
Oliver v. *Vance,* 34 Ark. 564.
Campbell v. *Ware,* 27 Ark. 67.
Wheelock v. *Simons,* 75 Ark. 19; 86 S. W. 830.
Byrd v. *Lipscomb,* 20 Ark. 19.

In *Hogan* v. *Finley,* 52 Ark. Rep. 55, it was decided that where a father, desiring to procure the title to certain lands belonging to the State and to give them to his son, procured a donation deed from the State to his minor son and paid the fee and expenses necessary to acquiring the deed, the title so obtained by the son was a new acquisition in the son, that the father took only a life estate in the lands, and that he had no interest he could devise.

To the same effect is the case of *Magness* v. *Arnold,* 31 Ark. Rep. 103.

The bench and bar of Indian Territory were confronted with new conditions and many intricate problems requiring solution. Upon arriving at a conclusion on the question here submitted, we had before us the following premises:

1st. This court and the United States Circuit Court of Appeals for the Eighth Circuit had held that the title to the tribal lands, prior to allotment, was vested in the tribe as a political entity, and that none of the citizens had any legal or equitable title to the lands.

2nd. This court, the United States Circuit Court of Appeals for the Eighth Circuit, and the United States Court of Appeals in the Indian Territory, had repeatedly held that the decisions of the Supreme Court of Arkansas, construing the Arkansas statutes put in force in the Indian Territory by Act of Congress, were binding upon the courts of the United States, and were recognized as establishing rules of property.

3rd. Chapter 49 of Mansfield's Digest had been repeatedly and consistently construed by the Supreme Court of Arkansas, whereby that court repeatedly announced that the father could only inherit in the event the estate was either ancestral or a new acquisition; that property could be acquired only through two means: by descent or purchase; that

> Section 1 of Chapter 49, insofar as real estate was concerned, should be construed with Section 10, and that Section 10 pointed out the only places wherein the parents inherited. Further, that public lands, when patented to a citizen, were a new acquisition by such citizen and not ancestral.

With these holdings and decisions, whereby it was established that the title to the domain of the Creek Nation was in the tribe as a political society, it is little wonder that the bar and bench in the Indian Territory were practically unanimous in holding that the allotment of a citizen of the tribe was a new acquisition in such allottee and not ancestral.

The opinion of the Court of Appeals in this case has provoked much discussion among the lawyers in Oklahoma, and has led to considerable litigation by way of suits brought by parents to cancel deeds upon the ground that they owned the fee instead of the life estate, and that the purchaser and themselves had concurred in a mutual mistake of law whereby the purchaser had obtained the fee when, in fact, the parties were selling nothing further than a life estate.

Judge Malcolm E. Rosser, one of the ablest *nisi prius* judges on the bench in the State of Oklahoma, and now a member of the Supreme Court Commission of this State prepared and read before the Oklahoma Bar Association for 1909 a paper discussing the decision of the Court of Appeals in this case. We have printed in the Appendix to this brief a copy of this article by Judge Rosser. The following statement from Judge Rosser's paper is more than conservative:

> "It was the opinion of most of the bar of Indian Territory that the estate of an allottee was a new acquisition within the meaning of the statute, and the lawyers who *studied* the land questions of that part of the State were, with a few exceptions, *very much surprised* when the Circuit Court of Appeals for the Eighth Circuit, in the case of *Shulthis* v. *McDougal*, 170 Fed. 529, decided that the allotment of a member of the Creek Tribe of Indians was not a new acquisition, but that it came by the father."

Hon. S. T. Bledsoe, for many years one of the leading lawyers in the Indian Territory and a specialist on land titles in the Five Tribes, published in 1909 an interesting volume, entitled "Indian Land Laws." On page 93 of his book, in discussing the decision of the Circuit Court of Appeals in this case, Mr. Bledsoe said:

> "It has been the practically unanimous opinion of lawyers residing in the Eastern District of Oklahoma concurred in by the writer that such an estate is a new acquisition. This opinion is based upon the decisions of the Supreme Court of Arkansas construing this statute prior to its adoption and the decisions of other courts construing like statutes."

In Volume 69, page 217, of the Central Law Journal, September 24, 1909, will be found a criticism of the opinion of the Court of Appeals in this case, wherein that journal takes issue with the finding that the allotment was ancestral and not a new acquisition.

This opinion, that the allotment was a new acquisition, was so well founded and so generally concurred in by the bench and bar that it was never seriously questioned, and in fact, counsel for the appellant in this case did not, either in the Circuit Court or the Circuit Court of Appeals, contend that the allotment was ancestral.

Many estates were partitioned by the courts in the Indian Territory and Oklahoma on the theory that the allotment was a new acquisition, and the reversionary interests of minors were sold in many cases subject to the life estates of their parents on the theory that the allotment was a new acquisition.

We, therefore, contend that the holding, that the allotment was a new acquisition, was a rule of property in the Indian Territory and Oklahoma under the decisions of the Supreme Court of Arkansas construing Chapter 49, and under the decisions of this court and the Circuit Court of Appeals, and the United States Court of Appeals in the Indian Territory, holding that the title, before allotment, was in the tribe and not in the individuals, and further holding that the construction of the Arkansas Statutes placed thereon by the Supreme Court of Arkansas was binding on the courts in the Indian Territory and Oklahoma.

In *Garcia* v. *Vela*, 216 U. S. Rep. 598-602, this court had under consideration the construction given to certain statutes by the local territory courts of Porto Rico, involving questions of inheritance and prescription. This court said:

> "We are not prepared to overthrow the assumption made by the court, *whose experience in such questions is entitled to much consideration, Armijo* v. *Armijo*, 181 U. S. 558, 561; *Albright* v. *Sandoval*, 216 U. S. 331, that the plaintiffs had a sufficient interest to entitle them to bring an action to set aside the so-called partition on the daughter's death, and that on their failing to do so the right to dispute the same was barred by lapse of time."

In other words, this court recognized the justness and necessity of refusing to overthrow the constructions given to such statutes by the lower courts, situated on the ground, and familiar through experience and observation with the intricate questions involved.

We therefore contend that the father of Andrew J. Berryhill had nothing farther or greater than a life estate. To give the father the entire estate would introduce practically a *different law of descent and distribution from that applicable when the citizen died the owner of his allotment.* It was never the intention of Congress and the Creek Nation to make the slightest distinction between the portions of estates acquired by heirs taking, technically, by descent, and heirs taking by purchase—that is, donation, as heirs. To distinguish between their rights would simply introduce into the present intricate laws another cog and another kink which would greatly add to the already highly confused condition of affairs. As heretofore pointed out, it was the intention to make an equitable equalization, and we confidently believe that there was no design and no intention to make the slightest difference and distinction between heirs taking by purchase—that is, donation, and heirs taking, technically, by descent.

There is another salient reason, which, to our minds, is conclusive of the point. There are hundreds of cases in the Creek Nation where children died leaving both the father and mother citizens of the Creek Nation and enrolled as such.

Clementine Berryhill, the mother of Andrew J. Berryhill, is excluded from any share in this land by Section 6 of the Supplemental Agreement, on account of her non-citizenship. As said, however, there are a great many cases where the mother and father are both citizens. Now, suppose the father and mother were both citizens—the estate, not having been acquired by the deceased during his lifetime, is neither ancestral nor a new acquisition. As demonstrated, the father and mother can acquire nothing by descent, except where the estate is one or the other. Now, what would the mother take? If the court gives the whole fee to the father, it must give it to the father upon the ground that it was an ancestral estate, yet it did not come by the father or any blood relation of the father. Why not give it all to the mother? She is as near of kin as the father. It came by neither the father nor mother, and there is no provision in the statute giving it to the father in preference to the mother, unless the estate is ancestral, and, in addition thereto, came by the father. The mother would, therefore, have as much right to the whole as the father.

Therefore, the only reasonable and the only sensible thing to do is to ascertain the heirs and their shares and portion under the Arkansas statute, *just as if* the estate—that is, the allotment—had been set apart to Andrew J. Berryhill during his lifetime and descended to his heirs, technically speaking. This was the manifest intention of Congress and the Creek Nation. They provide for the heirs taking by descent and the heirs taking by purchase, or donation, in the *same paragraph, and in the same words—in the same language—and, therefore, the conclusion must follow that no distinction was intended.*

A life tenant cannot lease land for mineral purposes. A life tenant cannot open new mines or explore the land for mineral purposes, although he can operate mines already open. The evidence in this case shows that no oil well was on this property at the time George Franklin Berryhill claims to have acquired title, and none was placed upon the land until April, 1907. The authorities are unanimous upon the proposition that the life tenant cannot lease the land for mineral purposes, and we therefore insist

that the lease made by George Franklin Berryhill to the complainant, Albert W. Shulthis, is void and ineffectual. We do not care to burden this already lengthy brief with citations of authority on this point, inasmuch as this proposition is not questioned.

Second Proposition.

If we be wrong in our contention that the court should determine the heirs and their shares and portions in the same manner, and to the same extent, and in the same way as if Andrew J. Berryhill had died the owner of the land in controversy, then we shall insist that the father, George Franklin Berryhill, acquired absolutely no estate or interest in the property.

We insist that George Franklin Berryhill was not an heir of Andrew J. Berryhill, deceased; that he was not nominated as an heir in this kind of a case by the statutes of descent and distribution of Arkansas in force in the Indian Territory.

If the contention of the counsel for complainant is correct that the court shall look only to the Arkansas statute to *determine who the heirs are*, and there stop and not look to the statute to determine the shares and portions taken by the heirs, then we say it is absolutely clear that George Franklin Berryhill, the father, is not nominated an heir by the statute of descent and distribution in force at the time. As heretofore shown, from whence the estate came is immaterial insofar *only* as it is necessary to determine the devolution of the same to the *descendants*. Descendants mean the downward line—that is, taking in succession. Bouvier defines descendants as those who have issued from an individual, and includes his children, grandchildren and their children to the remotest degree. The descendants from what is called the direct descending line. The term is opposed to that of ascendants. Those who are denominated descendants do not comprise all of those who come to the title by descent.

See Volume 3, Words and Phrases, page 2016.

The moment it becomes necessary to turn from the descending line, it becomes absolutely necessary and material to determine from whence the estate came.

See *Kelly* v. *McGuire,* 15 Ark., *supra,* and other Arkansas decisions cited.

Counsel for complainant say that Andrew J. Berryhill not having died the owner of the land consequently did not acquire it, and therefore it must follow that it was not a new acquisition. As above said, we concede that to be technically correct, Andrew J. Berryhill, not having acquired the land during his lifetime, and having died seized and possessed of no estate therein, it is also absolutely futile to insist that it was an *ancestral* estate. It logically follows, necessarily so, that the estate was neither ancestral nor a new acquisition.

Unless the court adopts the solution offered by us—that is, that the heirs and their shares and proportions shall be determined as if Andrew J. Berryhill had died the owner of the estate—then it must follow, and there is no escape from the conclusion that the father is not an heir of Andrew J. Berryhill, because the father can only inherit from the son, or from the child, when the estate is one or the other of two things—that is, ancestral, and, in addition thereto, from the father's line—or, a new acquisition. *It must be one or the other in order for the father to be an heir to the estate of his child.*

We are unable to see how counsel for complainant can extricate themselves from their own argument. If their theory is to be adopted, then complainant's lease is absolutely void, because George Franklin Berryhill, the lessor, had no estate of any kind or character in the land in controversy. If the father is not an heir, and acquired absolutely nothing, then who did take the estate? If no express provision can be found for this case in Mansfield's Digest—that is, in Chapter 49—then the heirs would have to be determined under the common law as provided for in the thirteenth section of Chapter 49 of Mansfield's Digest; that is, Section 2534, which provides as follows:

"In all cases not provided for by this Act, the inheritance shall descend according to the course of the common law."

Under the common law the father was not an heir. The estate never ascended. We are of the opinion the Arkansas statute expressly provides for and expressly names the heirs in a situation like this—that is, if the father and mother are to be entirely excluded, because the estate is neither ancestral nor a new acquisition. If the father and mother were not heirs for this reason—and they cannot possibly be heirs if the theory of complainant's counsel is correct—then the heirs would be determined by the 11th Section of Chapter 49 of Mansfield's Digest; that is, Section 2532 of the statutes, which is as follows:

"(11) Section 2532. The estate of an intestate, in default of a father and mother, shall go, first, to the brothers and sisters, and their descendants, of the father; next, to the brothers and sisters, and their descendants, of the mother. This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation."

If counsel for appellant be correct there is a "default of a father and mother" in this case. There is a default of a father because the father is not nominated an heir, on account of the fact that the estate is neither ancestral nor a new acquisition. The mother is not nominated an heir for the same reason, and for the further reason that a non-citizen is excluded by Section 6 of the Supplemetal Agreement. Therefore, the heirs are named in this section as "the brothers and sisters, and their descendants, of the father." The brothers and sisters of the mother are excluded on account of their being non-citizens, and are also excluded by this section because the evidence in this case shows there are brothers and sisters of the father, to-wit, the vendors under whom D. A. McDougal, defendant, claims the title.

This section further says:

"This provision applies only where there are no kindred, either lineal or collateral, who stand in a nearer relation."

There are no brothers and sisters of the deceased, no collateral kindred of any nearer relation than the uncles and aunts, and no lineal descendants, the deceased having left no issue or children. The father and mother are not lineal under the provisions of this paragraph, because the paragraph expressly provided for a case where there was no father or mother.

Before leaving this branch of the case there is one very important point we desire to impress upon the court, and that is this: The language used in an Indian treaty or agreement is construed, *not according to the technical meaning of its words to learned lawyers,* but in the sense in which they would naturally be understood by the Indians.

Jones v. *Meehan,* 175 United States 1.
22 Cyc., page 122.

Certainly the Indians never for an instant thought or understood that there was any difference between heirs taking by descent, technically speaking, and heirs taking by purchase. They evidently understood that heirs in both cases would take exactly the same way and in the same manner, and just as if the allotment had been owned by the deceased during his lifetime. In reality they thought all heirs would take by descent, and had no conception of heirs taking by purchase in the technical sense.

Reply to Brief and Argument of the Appellant, George Franklin Berryhill, Intervenor.

Under Section 16 of the Supplemental Agreement, "lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt, or obligation, nor be alienated by the allottee, *or his heirs,* before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. But for this express restriction on the heirs the heirs could sell, although the allottee was under the disability of restrictions. If the agreement had merely restricted

the right of alienation to the allottee the heirs would not have been under the disability of the treaty and could sell.

Tiger v. *Western Inv. Co.*, 221 U. S. 286.
Clark v. *Lord*, 20 Kan., 395.
Oliver v. *Forbes*, 17 Kan., 130.

The Supplemental Agreement with the tribe was ratified on July 26, 1902, and proclaimed by the president on August 8, 1902. The restrictions therein under Section 16 of the Supplemental Agreement did not expire until August 8, 1907.

Congress in 1906 passed an Act entitled "An Act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory, and for other purposes." This Act was approved on April 26, 1906, and became effective on that date. We insist that Section 22 of said Act removed the restrictions upon heirs who were not full-bloods, and enabled them to sell and alienate the lands taken by them as heirs.

Section 22 is as follows:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands *inherited* from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States court for the Indian Territory. And in case of the organization of a state or territory, then by a proper court of the county in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe" (34 Stat. at Large, 137).

The Supreme Court of Oklahoma in *Sanders* v. *Sanders*, 117 Pac. Rep. 338, held that this section removed the restrictions from mixed blood heirs without regard to whether the allotment was set apart to the deceased during lifetime.

If George Franklin Berryhill, the father, acquired any estate or interest in this land as an heir from Andrew J. Berryhill, deceased, it becomes material to determine next whether or not the deed executed and delivered by George Franklin Berryhill to Edmond McKay and Perry McKay, defendants, on June 5, 1906, for the sum of two thousand dollars, as a consideration, was valid.

In the brief and argument for the appellant, intervenor, will be found a good deal of buncombe and lamentation over the condition of the poor Indians. It will be noticed, however, that the two thousand dollars paid by the McKays to George Franklin Berryhill is neither refunded nor tendered back to the McKays. It is all right for an Indian to skin a white man, but it is a horrible thing for a white man to skin an Indian. We do not understand that courts of equity make any discrimination on account of color. The McKays paid two thousand dollars in cash for the interest of George Franklin Berryhill, which consideration was not only reasonable, but entirely adequate, and the transaction free from fraud. The land is now valuable for oil and gas, but its value was discovered some time after the interveror sold his interest to the McKays. On reading this record and the argument of counsel, the inference is irresistible that the intervenor has interceded at the instance of the appellant, Shulthis, and for his benefit.

And now comes counsel all the way from Chicago, Ill., to represent Poor Lo. The Intervenor has a wide acquaintance or at least the plaintiff, Shulthis, has.

First. Complainant's counsel insist that the use of the words "inherited from such decedent" restricts and limits the enabling provision of Section 22 to that particular class of heirs taking by descent or inheritance *strictly* and *technically* speaking. They insist that said Section 22 did not remove the restrictions from heirs taking by purchase—that is, heirs taking as conees. They therefore insist that George Franklin Berryhill, the father, if an heir, had no power to alienate the land before August 8, 1907, and that therefore the deed executed and delivered by him to the defendants, Edmond McKay and Perry McKay, on June 5, 1906, is null and void.

George Franklin Berryhill has filed an intervening petition in this case, in which bill of intervention he claims title to the land in controversy, and claims that the deed executed by him to the McKays on June 5, 1906, is void because the restrictions had not been removed.

Second. We insist that Section 22 removed the restrictions upon the adult heirs of any deceased Indian, except full-blood heirs. George Franklin Berryhill, as shown by the record, is not a full-blood Creek Indian, and is not enrolled as such. We insist that the words "May sell and convey the lands *inherited* from such decedent," were used to differentiate and distinguish between the allotment of the heirs in their own right as citizens of the Creek Nation, and allotments acquired by them as heirs, either by strict inheritance or by purchase.

Complainant's counsel never sprung this proposition until after the application for a receiver was made in this case in the latter part of January, 1908.

Strictly and legally construed, this section might be interpreted to limit the removal of restrictions to that particular class of heirs taking lands by *descent*, technically speaking. Such an interpretation, however, is absolutely contrary to the intent and meaning of Congress. This Section 22 must be construed in conjunction with the prior agreements made with, not only the Creeks, but *with all the tribes*. This Section 22, as well as the whole Act of April 26, 1906, as shown by its caption, applies to the Five Civilized Tribes, and not alone to the Creek Nation. The statute therefore must be construed in the light of the prior law applicable to each of the other tribes and all of the tribes as a whole, and this Act must be construed and interpreted as a whole. Section 22 must be construed in the light of the intent derived from the reading of the whole Act.

Sutherland Statutory Construction, Vol. 2, Sec. 368.

We will first, however, look to this statute with a view to its application to the Creek Tribe only; then we will look to the statute as applicable to all of the tribes. This section demonstrates more

fully than ever the correctness of our theory of this whole case—that is, that Congress and the tribe did not intend to make any distinction between heirs taking by descent, technically speaking, and heirs taking by purchase.

We shall go back first to the Original Agreement made with the Creeks in 1900 and approved and ratified in 1901, and see what this agreement says in regard to the law of descent and distribution. All in the Original Agreement pertaining to descent and distribution is found in Sections 7 and 28.

Section 7, insofar as applicable, is as follows:

> "The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

By Section 7, above quoted, the Creek law of descent and distribution was applied to the homestead, without regard to whether the heirs acquired the same by purchase—that is, as donees, or by descent, technically speaking. No difference is made.

Section 28 is as follows:

> "28. No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under Section Twenty-one of the Act of Congress, approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his

heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

Literally construed, said Section 28 only applied the Creek law of descent and distribution to that class where the allotment was set apart to the heirs after the death of the citizen. Literally construed, Section 28 did not apply the Creek law to a case of technical descent. Yet it is perfectly obvious that it was intended by the agreement to apply the Creek law, irrespective of when the allotment was made—that is, whether made before the death of the allottee, or after his death, and to the heirs. The agreement must be construed as a whole, and Section 7 and Section 28 harmonized if possible. Yet, literally construed, Section 28 did not apply the Creek law to a strict case of inheritance.

Section 6 of the Supplemental Agreement says:

"The provisions of the Act of Congress approved March 1, 1901, insofar as they provide for *descent* and *distribution*, according to the laws of the Creek Nation, are hereby repealed, and the *descent* and *distribution* of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory," etc.

Applying that strict and literal construction insisted upon by counsel for complainant, Section 6 could have no effect on Section

28 of the Original Agreement, because Section 28 of the Original Agreement was not, according to opposing counsel, technically speaking, literally and narrowly construed, a provision for descent and distribution, for the reason that heirs taking by purchase did not take by descent. Therefore, Section 6 of the Supplemental Agreement only repealed Section 7 of the Original Agreement, and left Section 28 unrepealed. Yet it is perfectly plain from reading Section 6 of the Supplemental Agreement, and Sections 7 and 28 of the Original Agreement, when taking into consideration the intention of the law and the purposes of the Supplemental Agreement, that the Arkansas law was substituted for the Creek law in its entirety. If not, the situation would be absurd and actually ludicrous. If Section 6 did not repeal Section 7 and Section 28 of the Original Agreement, then we indeed have a peculiar state of affairs. It would be about as follows:

First. The homestead of every citizen, without regard to whether the allotment was made before or after his death, would go, before the Supplemental Agreement, according to the Creek law.

Second. The homestead of every citizen, after the Supplemental Agreement, would go according to the Arkansas law to the heirs.

Third. The surplus—that is, the 120 acres—before the Supplemental Agreement, would go according to the Creek law.

Fourth. The surplus, after the Supplemental Agreement, would go according to the Creek law, if set apart to the heirs instead of to the deceased citizen.

Fifth. The surplus would go according to the Arkansas law, after the Supplemental Agreement, if set apart to the deceased during his lifetime.

Sixth. Where the dead citizen was a child born after July 1, 1900, his allotment would pass to the heirs under the Arkansas law, irrespective of whether it was set apart during his lifetime, or to his heirs after his death.

Certainly no such confusion as this was ever contemplated by the lawmakers. It is bad enough as it is without introducing

any further complications by a narrow, literal and technical construction of the statutes and treaties. The profession and the courts, have uniformly treated and construed the Supplemental Agreement, under the provisions of Section 6 thereof, as wiping out entirely the Creek law of descent and distribution. Thousands and thousands of dollars' worth of property have changed hands upon that construction. We have never heard it contended that the Creek law was not repealed in its entirety, yet, according to that literal and technical construction insisted upon by complainant's counsel, Section 6 only applied to Section 7 of the Original Agreement, because Section 7 of the Original Agreement, technically and narrowly construed, is the only provision of the Original Agreement in regard to *descent* and *distribution*. This, therefore, demonstrates more conclusively than ever the good sense and the sound reason for our theory and contention in this case—that is, that the whole thing must be treated in the same way and in the same manner as if the deceased had died the owner of the land.

Section 22 of this Act of Congress of April 26, 1906, evidently intended to remove the restrictions upon mixed blood heirs of deceased Indians, without any regard to technicalities, and without any regard to whether the heirs acquired the land by inheritance or by descent, technically speaking, or as the successors of a deceased citizen and as donees. The word *inherited* was used in Section 22 to differentiate between the citizen's own allotment and lands acquired by him as an heir. That was the intention of Congress, and that was the object in view. Any lawyer in drafting an Act with a view to removing the restrictions upon heirs, and, at the same time leaving no room for any contention that the restrictions were removed upon the citizen in as far as his own allotment was concerned, would have distinguished between the two by the use of the word *inherited*.

The section says: "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made," etc. Now, *the selection of Andrew J. Berryhill was made in* 1904, *two years before the passage of this Act*. There is abso-

lutely no conceivable reason why Congress would remove the restrictions upon heirs taking by descent, technically speaking, and not upon heirs taking by purchase. That never was in the mind of Congress. It is absolutely absurd and ridiculous to insist upon there being any *reason* for such a difference. Was a citizen of the Creek Nation any less competent to deal with the lands acquired by him as an heir by purchase—than a citizen acquiring lands as an heir by technical inheritance? Certainly not; it is not reasonable. The Supreme Court of Maine, in the case of *Holmes* v. *Parish*, 75 Me. 559, well remarked: "When the reason of the law ceases, the law ceases."

Counsel for complainant insist, however, that this Section 22 is absolutely clear and unambiguous, and that therefore there is no room for construction or interpretation. We admit that where the language of the statute is absolutely clear and unambiguous there is nothing to construe. This section, however, must be interpreted in view of the context and the spirit of the whole Act, and also in connection with the prior laws and treaties. Congress and the tribe had treated all of these matters as a *descent and distribution*, and they were simply carrying that out in Section 22 when they used the word *inherited*.

Hundreds and hundreds of thousands of dollars have been invested in the Indian Territory and in the Creek Nation in lands, and valuable improvements made thereon, upon the theory that Section 22 removed the restrictions upon mixed blood heirs, irrespective of whether the heir took by descent, technically speaking, or as a donee. And although the United States have instituted suits against over twenty-five thousand parties to remove deeds executed by Indian citizens in violation of the laws—especially Sections 19, and 22 as to full blood heirs—no suit has yet been brought to set aside deeds made by mixed blood heirs after April 26, 1906. As heretofore said, Section 22 applies to all of the tribes, and not to any particular tribe, to the exclusion of the others. Let us therefore examine some of the provisions of the other treaties in regard to descent and distribution.

By the Cherokee Agreement, made in 1902, and approved by Congress July 1st of that year, it is provided in Section 20 as follows:

> "If any person whose name appears upon the roll prepared as herein provided shall have died subsequent to the first day of September, nineteen hundred and two, and before receiving his allotment, the lands to which such person would have been entitled if living shall be allotted *in his name*, and shall, with his proportionate share of other tribal property, descend to his heirs, according to the laws of descent and distribution, as provided in Chapter Forty-nine of Mansfield's Digest of the Statutes of Arkansas. Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and proper time, the Dawes Commission shall designate the lands thus to be allotted."

The Choctaw and Chickasaw Agreement made in 1902 provides by Section 22 as follows:

> "If any person whose name appears upon the rolls, prepared as herein provided, shall have died subsequent to the ratification of this agreement, and before receiving his allotment of land, the lands to which such person would have been entitled if living shall be allotted *in his name*, and shall, together with his proportionate share of other tribal property, descend to his heirs according to the laws of descent and distribution as provided in Chapter Forty-nine of Mansfield's Digest of the Statutes of Arkansas. Provided, That the allotment thus to be made shall be selected by a duly appointed administrator or executor. If, however, such administrator or executor be not duly and expeditiously appointed, or fails to act promptly when appointed, or for any other cause such selection be not so made within a reasonable and practicable time, the Commission to the Five Civilized Tribes shall designate the lands thus to be allotted."

These provisions in the Cherokee Agreement and the Choctaw and Chickasaw Agreement expressly require the land to be allotted

in the name of the deceased, showing conclusively that the heirs are to take just as if they were taking by descent, technically speaking.

In the Creek Nation the Commission allotted all lands to deceased and in the name of the deceased, the patent issuing to the heirs. The allotment in this case was allotted by the Commission to Andrew J. Berryhill, deceased. (See Record, p. 210.) Can it be possible that Congress intended to limit the effect of Section 22 of the Act of April 26, 1906, in view of these provisions in the Cherokee Agreement and the Choctaw and Chickasaw Agreement, to that class of heirs taking by descent, technically speaking? Certainly not.

It is absolutely futile and impracticable to undertake a literal and technical construction of these agreements and the Acts of Congress pertaining thereto.

Section 6 of the Supplemental Agreement repeals the provisions of the Act of Congress approved March 1, 1901, "insofar as they provide for descent and distribution according to the laws of the Creek Nation, and the descent and distribution of lands and moneys provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest," etc.

Sections 7 and 8 of the Supplemental Agreement clearly require the enrollment of the name of the child, without regard to whether such child was living or dead. This enrollment was a condition precedent to any allotment being made, either to the child or to his heirs. The roll composed the units by which the allotments were to be made.

Under the provisions of Sections 6 and 7, the allotment of a child born after July 1, 1900, and living on May 25, 1901, would pass to the heirs under the Arkansas law of descent and distribution, without regard to whether the child died before receiving his allotment or after receiving his allotment. In other words, a child dying after receiving his allotment would leave the allotment to his heirs in accordance with Chapter 49 of Mansfield's Digest. Thus it will be seen that under Sections 6 and 7 of the Supplemental Agreement the Arkansas law—that is, Chapter 49 of Mansfield's

Digest, controlled, regardless of whether the allotment was made to the child before his death, or, in the name of the child and for the benefit of the heirs after his death. The same is true under the provisions of Sections 7 and 28 of the Original Agreement, with the exception that the Creek law controlled, regardless of whether the allotment was made before or after the death of the citizen. Throughout the provisions of both treaties Congress and the tribe used the word "descend." This word "descend" was used in a technical and also a non-technical sense. The word had a dual effect, to-wit, that the heirs of a citizen who received his allotment during his lifetime should take the allotment by strict inheritance under the Arkansas statute, chapter 49, and heirs of a citizen who died before receiving his allotment should take the allotment the citizen would have received in accordance with the same law—that is, Chapter 49 of Mansfield's Digest.

The word "descend" technically means the same thing as inherit. They are synonymous. The words descend, inherit and inheritance, in the statutes of the state, in reference to the estates of decedents, ordinarily relate to real estate.

Roundtree v. *Pursel*, 39 N. E. 747.

Anderson's dictionary defines the word "descend" as follows: "Pass by descent or inheritance," or "be inherited by," thereby expressing in a single term what otherwise might require a circumlocution. Descend means to pass by inheritance. Ordinarily for an estate to vest by operation of law in the heirs immediately upon the death of the ancestor.

"Descent" means hereditary succession to an estate in realty. The title whereby a man on the death of his ancestors acquires his estate by right of representation as his heir at law.

Anderson's Dictionary, page 348.

The word "inherit" is defined by the dictionaries to mean taking property by descent as an heir.

The word "inheritance" is defined as follows: "An estate which descends, or may descend, to the heir upon the death of the ancestor."

Anderson's Dictionary, page 544.

"Inherit" means to take as an heir at law by descent or distribution.

Warren v. *Prescott,* 30 Am. St. Rep. 370.

Thus it will be seen that the word "descend" and the word "inherit" are, from a technical standpoint, *synonymous.* The word "inherit" was used by Congress and the Creek Nation in this very Section 6 of the Supplemental Agreement and used with a dual effect, just as the word "descend" was used in Sections 6 and 7 of the Supplemental Agreement and in Sections 7 and 28 of the Original Agreement.

In Section 6 it is provided:

"That only citizens of the Creek Nation, male and female, and their Creek descendants, shall *inherit lands of the Creek Nation."* To give this clause any meaning the word inherit must be interpreted in the same sense the word "descend" must be interpreted —that is, with a dual effect, as used in the treaties. It was clearly and manifestly the intention of the tribe and Congress in this clause in Section 6 to exclude non-citizens from taking land of citizens of the Creek Nation as heirs in both cases—that is, in a case of strict descent and in a case where the heirs took by purchase. "Inherit lands of the Creek Nation" is an impossibility, technically speaking. No one could be an heir of the Creek Nation. The word inherit, therefore, must be given some meaning, if possible and practicable, and the only meaning which it can have here is the same meaning that must be attributed to the word "descend" as used in this section and the other sections heretofore referred to. The word "descend," therefore, as here used, has a dual effect, to-wit:

First. It means to exclude non-citizen heirs from inheriting, in a technical sense, lands of citizens of the Creek Nation.

Second. It also excluded non-citizen heirs from taking lands in the Creek Nation as heirs of a deceased citizen who died before receiving his allotment.

There can be no doubt about our contention that Congress and the tribe used the word "descend" and the word "inherit" with a

dual effect and made that one word cover all kind of cases, without any intention of making any difference or differentiation between heirs taking by descent, strictly and technically speaking, and heirs taking by purchase.

We, therefore, desire to call the court's attention to this proposition of statutory construction, to-wit:

> "When the legislature has used a word in a statute in one sense and with one meaning, and subsequently uses the same word in legislating on the same subject-matter, it will be understood as using the word in the same sense, unless there is something in the context or in the nature of things to indicate that it intended a different meaning thereby."
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> Black on Interpretation of Laws, p. 205.

> "The purpose of the rule of construction under discussion is, of course, like that of every other, to elucidate the meaning of a given statute. Its method is to ascertain the meaning of any particular phrase or provision in the light of every direction made upon the subject-matter it refers to by the legislature up to the time when the court is called upon to pronounce its judgment. It requires particular phrases, left doubtful by the act itself, to be construed as synonymous with, or analogous to, the same phrases used in other statutes upon the same subject, in such connections or surroundings as define their meaning beyond question, or point emphatically to a certain interpretation. It requires gaps left in the act, not amounting to *casus omissi*, to be filled from the materials supplied by other statutes upon the same subject and in harmony with them. It requires words capable of several meanings, the choice among which is not determined by the use of words in a definite and unmistakable sense in one of the other statutes to be so construed, if possible, as to preserve in force and effect, side by side with them, the words of earlier statutes, to the avoidance of an interpretation which would raise a repugnancy between the earlier and later statutes, fatal to the former. The effect is to preserve harmony and consistency in the entire body of the legislation upon a given subject-matter."
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> Endlich Interpretation, par. 53.

"So the meaning of particular words in a recent statute will have weight; and their meaning may be inferred from earlier statutes in which the same words or language has been used, where the intent was more obvious or had been judicially established. The words of a statute, if of common use, are to be taken in their natural, plain, obvious and ordinary signification; but if a contemporaneous construction by the legislature of the same words can be discovered, it is high evidence of the sense intended. Where the lawmaker declares its own intention in the enactment of a particular law, or defines the sense of the words it employs in a statute, it not only exercises its legislative power, but exercises it with a plausible aim; for it professes to furnish aid to a correct understanding of its intention, and thus to facilitate the primary judicial inquiry in the exposition of the law after it is finished, promulgated, and has gone into practical operation. The legislature in passing an act may declare its meaning and construction, and such declaration will be binding on the courts. An act declaring the meaning of a former act will be given effect prospectively."

Sutherland Statutory Construction, 358.
Sheehan v. *Louisville & N. R. Co.*, 101 S. W. Rep. 380.
Collins Coal Co. v. *Hadley*, 78 N. E. Rep. 353-355.
Green v. *Weller*, 32 Miss. 650.

It is too obvious for debate that the Indian Tribe never had any idea of the difference or distinction between heirs taking by descent, strictly and technically speaking, and heirs taking by purchase. It is unreasonable to imagine for a moment that they ever had any appreciation of that distinction. It therefore becomes necessary to construe the treaties in the light the parties construed it.

In *Jones* v. *Meehan*, 175 U. S., page 1, this court said:

"In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed

by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of *legal expression,* and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must, therefore, be construed, *not according to the technical meaning of its words to learned lawyers, but in the sense in which they would naturally be understood by the Indians."*

Having ascertained the meaning, effect and purview of the word descend and the word inherit, as used in the treaties, let us turn to section 22 of the Curtis Act of 1906, and read said section and apply it in the light of the use of these words in the treaty. We insist that the word "inherited," used in Section 22, has the same meaning, the same effect, and the same purview attached and fixed to the word "inherited" and to the word "descend" by the Creek Nation and the United States in the Original Agreement and the Supplemental Agreement, and it should, therefore, be construed as having a dual effect and operating on both classes of heirs.

Any other construction would be a narrow, technical and unreasonable construction, operating as an unjust, unreasonable, unwarranted and absurd discrimination against those heirs not taking technically by descent. These treaties and the subsequent acts of Congress pertaining thereto were not passed with a sole view to a technical construction by learned lawyers. They were passed for the tribe,—a people unlettered and unacquainted with technical words and phrases. The intention of the legislature is the guiding star. The court in construing treaties will give effect to the legislative intent and not defeat it by adhering too literally to the letter of the statute.

Inhabitants of Gray v. *Cumberland County Commissioners,* 22 Atl., 376, and a large number of cases cited in Century Digest, Volume 44, pages 2810 and 2811.

In construing a statute when the words are susceptible of two different senses, the court will adopt that sense which will not lead to an absurdity.

City of Jefferson v. *Weems,* 5 Ind. 547.

A statute must receive a sensible construction, even though such construction qualifies the universality of the language.

People v. *Admire,* 39 Ill. 251.
Green v. *Weller,* 32 Miss. 650.

> "When the legislature has clearly laid down a rule for one class of cases, it is not readily to be supposed that in its choice of words and phrases, or in the enactment of various provisions in the same act, it has prescribed a different rule for another class of cases within the same reason as the first; a construction which will avoid such *senseless discrimination* should be adopted where the meaning of the statute as evidenced by its language is debatable. Courts should strive to avoid imputation of a design to distinguish between cases upon a course of reasoning too unsubstantial and too finely drawn for the regulation of human action. Thus, Chief Justice Marshall found insuperable difficulty in attributing to Congress an intention to confer on the Supreme Court appellate jurisdiction over judgments rendered by a district court sitting as a district court, and over judgments rendered by a circuit court, as it had clearly done, and at the same time to deny such jurisdiction over judgments rendered by a district court exercising circuit court powers, it being demonstrated that Congress made no distinction in the judgments from their *nature and character.*"
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> Federal Annotated Sts., Vol. 1, LVIII.

In *Lossmiller* v. *State,* 144 Wisc. 169, 91 Am. St. Rep. 910, the rule is plainly laid down, that:

> "Where a meaning is evident, and *leads to no absurd conclusion,* there can be no reason for refusing to admit the meaning which the words ordinarily represent. It is fundamental that if, giving to the words of an act their literal or natural meaning, the conclusion reached would be unreasonable or absurd, some other meaning within the reasonable scope of the words may be adopted to avoid that result, if it appears that such other meaning *may probably have been the one intended.*"

In *Wisconsin Industrial School for Girls* v. *Clark County,* 79 N. W. 423, we find the following discussion:

"By one of the most familiar rules for statutory construction, we may and should reject, any meaning that may be attributed to the statutes which would lead to an absurd or unreasonable result. It is often said that the true rule to be observed in a situation like the one before us is to look to the whole and every part of the law, to the intent apparent from the whole to the subject-matter, to the effect and consequences, to the reason and spirit, and thereby ascertain the ruling idea present in the legislative mind at the time of its enactment, and then, if the manifest purpose of the law-makers can thereby be reasonably spelled out of the words they used to express it, to give effect to such purpose though the meaning thus adopted be quite contrary to the literal sense of the words. When the legislative will, attempted to be expressed in a statute, is worked out in the manner indicated, it is as much a part of the law and as binding on courts as if literally expressed therein."

"A statute is to be construed as a part and parcel of the whole uniform system of the laws on the subject."

United States v. *Moore*, 161 Fed. Rep. 519.
State v. *Boswell*, 4 N. E. 676.
United States v. *Morton*, 65 Fed. Rep. 209.

It is entirely evident and absolutely obvious that Congress used the word inherited in Section 22 with the sole view of distinguishing between the allotment—that is, the 160 acres of the citizen, and the lands a citizen acquired as an heir, either by purchase—as donees, or by descent, technically speaking. Nowhere in any treaty or act of Congress was any differentiation attempted. But in order to leave no room for any controversy, Congress declared in Section 5 of the said Act of April 26, 1906—the same act containing Section 22:

"That all patents issued before the passage of the Act, where the allottee died before the same became effective, should be given the same effect as if the allottee or citizen had lived and received his allotment."

This leaves no longer any reasonable ground for a contention as to the meaning of Section 22 and what Congress intended by that

provision. It is absolutely absurd to contend for one moment that Congress ever had the slightest intention of discriminating against heirs who by some accident happened to take by purchase instead of by descent, technically speaking. There is no reason for any such discrimination and no justice in it. Section 22 must be construed as applying to the Five Tribes and not alone to the Creek Nation, and when thus construed, in the light of the agreements with the other nations where the treaties provided for the allotment to be made in the name of the deceased and the patent issued to the deceased, how can there be attributed to Congress any intention to discriminate against heirs taking by purchase, technically speaking? If any such intention could have been attributed by a refined and delicate course of reasoning, Congress put it at rest in Section 5 of this act. It is true a patent to a dead person might be void, technically, but the grant would inure to the heirs just the same, and that was exactly what was done in the Cherokee Nation and the Choctaw and Chickasaw tribes. The patent was issued to the deceased.

The Original Creek Agreement and the Supplemental Agreement with the Five Civilized Tribes all being dependent for their validity upon the consent of the Indians are substantially treaties with said several tribes. Acts in this form having taken the place of the ancient Indian treaties since 1871, and are, therefore, subject to the same rules of construction laid down by the Supreme Court as Indian treaties.

XX Opinions, Attorney General, 712.

The United States Circuit Court of Appeals for the Eighth Circuit has said that in construing the legislation enacted for the five tribes (having at the time under consideration the act of May 2, 1890,)

> "it is generally safe to reject an interpretation that does not naturally suggest itself to the mind of the casual reader, but it is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey."

Ardmore Coal Co. v. *Bevil*, 61 Fed. Rep. 759.

The citizens of the Five Tribes were made citizens of the United States in March, 1901, and therefore acquired all of the privileges and immunities of other citizens of the United States An Act of Congress removing the restrictions upon the alienation of lands by any of these citizens might be subject to a strict construction were they mere wards of the nation and not endowed with the rights and privileges of American citizens. But an Act of Congress removing the restrictions upon the alienation was an act granting a privilege to which the citizens were already entitled, as a matter of right, though not a matter of law. The act was a mere recognition of their equal rights with other citizens, and such act should not have a literal strict construction, and no authority can be found to sustain that contention. None has been cited by counsel for complainant. An act, recognizing their equal rights and privileges with other citizens, should have a liberal construction.

The literal construction of any statute is plain and unambiguous where the words have any meaning. As further illustration of the construction to be put on words by the courts, we refer to the following decision rendered by the Supreme Court of Tennessee in *Rose* v. *Wortham,* 30 L. R. A. 610:

The court said:

"The decision of this question involves the construction of the statutes brought forward in the compilation of Milliken & Vertrees as Sections 3135 and 3335, and which are as follows:

'Sec. 3135. A life insurance effected by a husband on his own life shall inure to the benefit of the widow and next of kin, to be distributed as personal property, free from the claims of his creditors.'

'Sec. 3335. Any life insurance effected by a husband on his own life shall, in case of his death, inure to the benefit of his widow and children, and the money thence arising shall be divided between them according to the law of distribution, without being in any manner subject to the debts of the husband, whether by attachment, execution, or otherwise.'

It is insisted for the creditors that it is only such life insurance as is effected by the husband as husband, during the

existence of the marital relation, that is thus referred to and regulated, and that an insurance effected before the marriage relation begins is not contemplated by these statutes, and does not fall within their provisions. In Sutherland on Statutes and Statutory Construction it is said in substance, that the presumption is that the lawmakers have a definite purpose in every enactment, and that purpose is an implied limitation on general terms, and a touch stone for the expansion of narrower terms used in the statute. The cardinal purpose of the act must control, and words and phrases must be read in such sense as will harmonize with the subject-matter and general purpose of the statute. Mr. Kent, on the same subject, says, in substance: In the exposition of a statute the intention of the law-maker will prevail over the literal sense of the terms, and its *reasons* and intention will prevail over the strict letter. Not only may the meaning of words be restricted by the subject-matter of an act, but, for like reason, they may be expended. The intention of the act will prevail over the literal sense of its terms. The particular inquiry is not, what is the abstract force of the words used? But, in what sense were they intended to be used as found in the act? This sense is to be collected from the context, and a narrower or more extended meaning is to be given, according to the intention thus indicated.

Sutherland Stat. Const. 219, 240, 241, 246.

Accordingly, in *Silver* v. *Ladd*, 74 U. S. 7 Wall. 219, 13 L. Ed. 138, the term 'single man' was held to include an 'unmarried woman' in the construction of the Oregon Donation Act of Congress.

In *Ragland* v. *Justices of Inferior Ct.*, 10 Ga. 65, 71, a minor with his parents living was held to be an orphan, in order to make the statute in question fully answer its obvious purpose and intention.

In *Richardson* v. *Duncan*, 2 Heisk., 220, it was held by this court that an 'ass' was within the meaning of the law exempting from execution a horse, mule, or yoke of oxen in the hands of a person engaged in agricultural pursuits.

So in *Webb* v. *Brandon*, 4 Heisk. 288, it was held that an 'ox wagon' was embraced under the words of the statute exempting an 'ox cart' or a 'two-horse wagon.' "

The courts will not indulge in the construction of a statute rendering it absurd.

Sutherland Stat. Const. Vol. II, Sec. 376.

This shows the wisdom of a remark of Justice White of the Supreme Court of the United States in *Rhodes* v. *State of Iowa*, 170 U. S. 412, that "the subtle signification of words and the niceties of verbal distinction furnish no safe guide for the construction of an Act of Congress. On the contrary, it should be interpreted and enforced by the light of the fundamental rule of carrying out its purpose and object." That it was the purpose of Congress to remove the restrictions upon the mixed blood heirs, irrespective of how they acquired the land, is clear from the act as a whole in the light of the treaties made with the several tribes.

Sutherland on Statutory Construction, Volume 2, Section 379, says:

> "A thing which is within the object, spirit and meaning of the statute is as much within the statute as if it were within the letter. Conversely, a thing which is not within the intent and spirit of a statute is not within the statute, though within the letter."

The same authority further holds that:

> "The words of a statute may be enlarged or restricted to carry out the intent, and words may be inserted; one word may be substituted; words may be disregarded or eliminated; and words and phrases may be transposed."
>
> Sutherland Statutory Construction, Volume 2, Sections 381, 382, 383, 384 and 386.

The same authority further says:

> "When it is plainly perceivable that a particular intention, though not *precisely* expressed, must have been in the mind of the legislature, that intention will be enforced and carried out and made to control the *strict* letter."
>
> Sutherland Statutory Construction, Volume 2, Section 373.

These principles are elementary and no further citation of authority is needed. We have examined a great number of decisions supporting the text of authority above cited. We call the court's attention to *Spencer* v. *Myers,* 150 N. Y. 269.

Under the laws of the State of New York, before the act of the legislature of 1879, a married woman was unable to assign a policy of insurance for her benefit upon the life of her husband. The legislature of that State in the year 1879 passed a law entitled "An act for the relief of policy holders in life insurance companies," the first section of which is as follows:

> "All policies of insurance heretofore or hereafter issued within the State of New York upon the lives of husbands for the benefit and use of their wives, in pursuance of the laws of the state, shall be, from and after the passage of this act, assignable by said wife with the written consent of her husband; or, in case of her death, by her legal representative, with the written consent of her husband, to any person whosoever, or be surrendered to the company issuing such policy, with the written consent of her husband."

A married woman in that state assigned an insurance policy on her husband's life issued and delivered in the State of Connecticut, and not taken out, issued or delivered in the State of New York. The validity of the assignment of the policy was assailed upon the ground that the policy in question was not issued within the State of New York, and therefore not within the terms of Section 1 of the Act of 1879, removing the disabilities upon the assignment of policies issued "within the State of New York upon the lives of husbands." The Court of Appeals said:

> "The learned counsel for the plaintiff insists that it applies only to policies issued within the State of New York. That is to say, that it extends no further than to enable them to assign policies issued by our domestic companies, and that, since the policy in question was issued by a foreign company and in another state, the disability to assign still exists and existed when the defendant made the assignment in question. We think that such a construction of the statute is altogether too narrow. It rests entirely upon a close adherence to the literal meaning of words, and fails to take into consideration

the policy and general purpose of the statute. Of course, it was passed for the purpose, as indicated by the title, of relieving married women from the disability referred to, but what good reason is there for saying that the legislature intended, in a case where two policies were issued upon the husband's life for the benefit of the wife, one by a foreign and the other by a domestic company, that the latter was to be assignable and the former not? It is difficult to suppose any practical or rational purpose which the legislature could have had in view, if it intended to remove the disability to assign as to half of these policies and to retain it as to the other half. It must be assumed that the intention of the statute was to make obligations of this character held in this state, wherever created, assignable. It is scarcely possible that the question as to which side of the boundary line of the state the policy was made or delivered could have been present in the legislative mind."

The Court of Appeals of New York quotes from the decision in *People* v. *Lacombe,* 99 N. Y., 43, as follows:

"In the interpretation of statutes, the great principle which is to control is the intention of the legislature in passing the same, which intention is to be ascertained from the cause or necessity of making the statute, as well as other circumstances. A strict and literal interpretation is not always to be adhered to, and where the case is brought within the intention of the makers of the statute, it is within the statute, although by a technical interpretation, it is not within its letter. It is the spirit and purpose of a statute which are to be regarded in its interpretation; and, if these find fair expression in the statute, it should be so construed as to carry out the legislative intent, even although such construction is contrary to the literal meaning of some provisions of the statute. A reasonable construction should be adopted in all cases where there is a doubt or uncertainty in regard to the intention of the lawmakers."

These general rules are upheld by numerous authorities:

People v. *Davenport,* 91 N. Y., 574.
People v. *Coleman,* 121 N. Y., 542.
Smith v. *People,* 47 N. Y., 330.

We cite the following authorities:

Spencer v. *Myers,* 150 N. Y., 269; 55 Am. St. Rep. 675.
Eyre v. *Harmon,* 92 Calif., 580, 28 Pac., 779.
Ott v. *Young,* 78 Miss., 487, 29 South., 520.
Adams v. *R. R. Co.,* 75 Miss., 285, 22 South., 826.

We invite the court's attention especially to the case last above cited.

Sutherland on Statutory Construction, Section 376, says:

"The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention."

In Section 374 the learned author says:

"The natural import of words is their literal sense; but this may be greatly varied to give effect to the fundamental purpose of a statute."

The court will find apt illustrations of the flexibility of words and clauses in Sections 374 and 375, Volume 2, Sutherland on Statutory Construction, and, for convenience, we here set them out:

"374. (245) *The Flexibility of Words and Clauses to Harmonize with General Intent.* The natural import of words is their literal sense; but this may be greatly varied to give effect to the fundamental purpose of a statute. The general object of a statute was to restore uniformity in taxation in counties and cities; to effect this, existing laws relating to incorporated towns and cities had to be repealed, that the provisions of the act applicable in terms to both might have effect. There was a repealing clause in the act that 'all laws requiring any *city* to support and provide for its paupers, etc., are hereby repealed.' One question which came before the court was, whether the clause included laws so providing for incorporated towns; the decision was in the affirmative. The court followed the rule laid down in *Mason vs. Finch,* that, 'in construing statutes, courts look at the language of the whole act, and if they find in any particular clause an ex-

pression not so large and extensive in its import as those used in other parts of the statute, if, upon a view of the whole act, they can collect from the more large and extensive expressions used in the other parts the real intention of the legislature, it is their duty to give effect to the larger expression.' The court say: 'Even if the word city was not sufficiently comprehensive to embrace incorporated towns, yet under the rule announced in the case (referred to), it cannot be doubted that the larger and more extensive signification was intended by the use of the word city.' The converse is illustrated by the example of a statute which required a notice to be given, under which undoubtedly either a written or verbal notice would suffice. But as a subsequent section required the notice to be served on a person, or left with him, thus employing words implying a written notice, the notice to be given was construed to mean a notice in writing. The seemingly incongruous provisions must be so construed as to harmonize with the general intent manifested in the whole enactment.

375. *Same—Illustrations.* A statute provided that, if any party obtained a verdict in his favor should give to any of the jurors in the cause, before or after verdict and during the term, 'any victuals or drink' by way of treat, the verdict should be set aside. Treating with *cigars* was held to be within the statute. A *lessee* having the control of a reservoir and being under obligation to complete and maintain it was held to be an owner within the intent of a statute providing that 'the owners of reservoirs shall be liable for all damages arising from leakage or overflow of water therefrom or by floods caused by the breaking of the embankments of such reservoir.' An act required county boards to appoint 'some suitable graduate of medicine' to attend the indigent sick. This was held to mean not necessarily a graduate of a medical school, but any one licensed to practice medicine pursuant to the statutes of the state. 'It cannot be said,' says the court, 'that the meaning of the words is clear, and in such a case the statute should be given such construction as will not deprive the person interested in its construction of a substantial right.' An act to create a railroad commission and provide for the supervision, regulation and control of railroads contained a provision that 'appeals by either party shall lie from judgments, orders and decrees of inferior courts, in all

suits and cases brought under the provisions of this act, to the same extent that appeals lie in similar suits and cases brought under any other law in this state.' It was held that the word appeals was used in its popular, broadest and most comprehensive sense and included any and all appropriate appellate proceedings provided by law for reviewing judgments, orders and decrees, whether by writ of error, or by an appeal proper in its strictest technical sense. An act which in terms applied to companies was held to include individuals engaged in the same business. An act provided that no person should be eligible to the office of county attorney 'who is not duly admitted to practice as an attorney in some court of record in this territory.' The court says: 'The statute, it is true, does not say in terms that he must not have been disbarred from practice in the very court in which the law requires him to perform certain professional duties, but the terms of the act show that this was within the reason and intent of the legislature. It was within the purpose and spirit of the act, and that which is within the reason, purpose and intention of the language used is as much within the act as though it were a part of the language itself.' An act of Congress provided for appeals from certain *quasi*-judicial tribunals in the Indian Territory to the 'United States District Court.' There was no court of that name in the territory and the language was construed to mean the United States court for the territory. An act of Congress provided that all intoxicating liquors transported into any state or territory, or remaining therein for use, consumption, sale, or storage therein, *should, upon arrival in such state or territory*, be subject to the laws of such state or territory to the same extent as if produced therein. It was held that the words in italics were not to be taken literally as meaning arrival at the state line, but arrival at destination, including delivery to consignee. An act which authorized the purchase, or if necessary, the appropriation, of land for cemetery purposes, provided that no land should be so appropriated within two hundred yards of any dwelling house. It was held that the intent was to prevent the evil effects of a cemetery within the specified distance of a dwelling, and that the words *so appropriated* should be read in the sense devoted to the *purpose* in question and so as limiting the acquisition of property by contract or condemnation."

Further on the Outcome of a Technical Construction.

In Section 7 of the Original Agreement, made with the Creeks, and in Section 28 of the Original Agreement made with the Creeks, both of which sections have heretofore been quoted, Congress and the Tribe put in force the Creek law of *descent and distribution.* Technically, the Creeks had no law of *descent,* for the reason that no individual citizen of the Creek Nation owned or had any title to any part or portion of the domain of the Creek Nation. A law of descent applies solely, in a technical sense, to the devolution of real property. Distribution applies to the inheritance of personal property. The Creeks had no law of descent in the technical sense, and if Sections 7 and 28 of the Original Agreement are to be literally and technically construed, then they would be void for the reason that the Creek Nation had no law of descent upon which those sections could operate.

The Creeks did have a law of distribution, which is embodied in the public printed acts of the National Council. The United States courts in the Indian Territory, as well as the bar in general, held that the Creek law of distribution was made a law of descent under these provisions of the Original Agreement. This was also decided by the Supreme Court of the State of Oklahoma in the celebrated case of *De Graffenreid* v. *The Iowa Land & Trust Co.,* 95 Pac., 640. Yet, if that literal and technical construction is to be carried out, as insisted by counsel for complainant, then it will follow that Sections 7 and 28 of the Original Agreement were void because of an uncertainty.

If a technical construction is to be applied to these treaties and agreements, then we shall insist that heirs taking by purchase—that is, as donees, and not technically by inheritance, could alienate and dispose of lands patented to them as heirs, for the reason that no provision can be found in the treaties made with the Creek Nation restricting the right to alienate by heirs taking by purchase—that is, as donees, as distinguished from heirs taking by descent, technically speaking.

Section 7 of the Original Agreement, in regard to restrictions on alienation, is as follows:

"Lands allotted to citizens hereunder shall not in any manner whatsoever, or at any time, be incumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and *such lands* shall not be alienated by the *allottee* or *his heirs,* at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior."

Section 16 of the Supplemental Agreement, in regard to restrictions on alienation, is substituted for Section 7 of the Original Agreement, and is as follows:

"Lands allotted to citizens shall not in any manner whatever, or at any time, be incumbered, taken or sold, to secure or satisfy any debt or obligation, *nor be alienated by the allottee or his heirs,* before the expiration of five years from the time of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior."

As heretofore pointed out, a restriction against the allottee is not a restriction against the heirs, but the heirs were placed under the same disability the allottee was under, by the words: "Nor be alienated by the allottee or his heirs." Literally construed, this only applied to the allottee receiving his allotment during his lifetime. That is, if Andrew J. Berryhill had received his allotment during his lifetime and died the owner thereof, he and his heirs would have fallen under the disability mentioned in Section 16 of the Supplemental Agreement, wherein it is provided: "Nor be alienated by the allottee or his heirs." This means, literally construed, to limit and restrict the power of the *allottee,* and in the event of his death before the expiration of the five years, the restriction and limitation passes to his heirs, and they cannot alienate until the expiration of the five years. Andrew J. Berryhill, technically speaking, was not an allottee of this land, and therefore never labored under any disabilities of the treaty. Heirs, technically construed, mean: Those persons acquiring property by *descent*—those succeeding to an estate of a deceased person by inheritance.

Anderson's Dictionary, page 508.

Whoever answers the description of heirs of Andrew J. Berryhill, deceased, did not acquire this land as heirs, in the technical sense, because they did not take it by descent or by inheritance. Then, where is there any restriction upon the power of sale by those taking land by purchase as heirs, in a descriptive sense? Whatever interest George Franklin Berryhill, the father, acquired was not acquired by him in a technical sense as an *heir*, because he did not take it by descent or by inheritance, if we are to pursue the course of technical reasoning applied by counsel for complainant and intervenor. Whatever interest or title George Franklin Berryhill acquired in this land, was acquired by donation, and not as an heir. Therefore, we would have no restrictions on his power of sale under a literal construction of Section 16 of the Supplemental Agreement.

Allottee and allotment are defined in the Original Agreement. Section 3 of the Original Agreement provides for an appraisement of the lands of the Creek Nation, and Section 3 is as follows:

> "3. All lands of said tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. *One hundred and sixty acres of land*, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any *allottee* receiving lands of less than such standard value may, at any time select other lands which at their appraised value are sufficient to make his allotment equal in value to the standard so fixed.
>
> If any citizen select lands, the appraised value of which, for any reason, is in excess of such standard value, the excess of value shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds of the tribe until all other citizens have

received lands and money equal in value to his allotment. If any citizen select lands the appraised value of which is in excess of such standard value, he may pay the overplus in money, but if he fail to do so, the same shall be charged against him in the future distribution of the funds of the tribe arising from all sources whatsoever, and he shall not receive any further distribution of property or funds until all other citizens shall have received lands and funds equal in value to his *allotment;* and if there be not sufficient funds of the tribe to make the allotments of all other citizens of the tribe equal in value to his, then the surplus shall be a lien upon the rents and profits of his allotment until paid."

"One hundred and sixty acres of land, valued at six dollars and fifty cents per acre shall constitute the standard value of an allotment."

Section 3 provides that "any allottee receiving lands of less than such standard value may, at any time, select other lands which at their appraised value are sufficient to make *his allotment* equal in value to the standard so fixed." A citizen of the Creek Nation was, therefore, limited to an allotment of 160 acres, and could not have two allotments. One hundred and sixty acres was an allotment, and an *allottee* was a citizen receiving as his distributive share of the lands 160 acres.

If Andrew J. Berryhill had received while living his proportionate part of the land of the Creek Nation, he would have been an allottee, and neither he nor his heirs could alienate for five years from the date of the approval of the Supplemental Agreement. Andrew J. Berryhill was not an allottee, technically speaking, and those acquiring his lands as heirs by description were not heirs of an allottee, technically speaking, and, therefore, not being heirs of an *allottee,* were not under the restrictions against alienation, because the restrictions were only on the allottee and his *heirs,* that is, the heirs of the allottee. The heirs of Andrew J. Berryhill were not heirs of an allottee.

Section 16 of the Supplemental Agreement, as well as Section 7 of the Original Agreement, provides for each allottee to have a homestead of 40 acres, "which shall be and remain non-

taxable, inalienable and free from any incumbrance for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear." The 40 acres which would have been the homestead of Andrew J. Berryhill, had he lived to receive his allotment, passed to his heirs. Can it be said that his heirs could not alienate that 40 acres for 21 years? There is no provision in the treaty at any place, and it was not contemplated for any citizen to have two homesteads. The section expressly provides that:

> "The homestead of each citizen shall remain after the death of the allottee for the use and support of children born to him after May 25, 1901, but, if he have no such issue, then he may dispose of his homestead by will, free from the limitation herein imposed, and, if this be not done, the land embraced in his homestead shall descend to his heirs, free from such limitation, according to the laws of descent herein prescribed."

Unquestionably the heirs of Andrew J. Berryhill acquired the whole 160 acres and the 40 acres which would have been the homestead of Andrew J. Berryhill, had he lived to receive his allotment, passed to his heirs, not as a homestead, but as the other lands conveyed—that is, as the surplus, free from the limitation against alienating it for 21 years. Technically construed, the homestead which Andrew J. Berryhill would have acquired, if living, passed to his heirs, with a prohibition against its sale for 21 years. Yet, there is no reason for this, because it was not the homestead of the heirs; the heirs had a homestead of their own. The heirs of Andrew J. Berryhill acquired the homestead free from any limitation against its alienation for 21 years just as if they had acquired the homestead by technical descent, yet, literally and technically construed, the homestead would pass to the heirs of Andrew J. Berryhill burdened with a restriction against its alienation for 21 years, which we believe was never contemplated by the lawmakers. Why should heirs taking the homestead by descent be relieved of the twenty-one year limitation against alienation, and

heirs taking the homestead by purchase—that is, as donees, be burdened with the restriction against the alienation of that particular forty acres for 21 years from the date of the deed? There is absolutely no sense in this; no reason for it. This simply illustrates further the absurdity and futility of a literal and technical construction of these agreements made with the tribes and the acts of Congress appertaining thereto.

Congress and the tribes both treated all heirs whether taking technically, by purchase, or technically by descent, as taking by inheritance and by descent, insofar as their rights and privileges, shares and portions were concerned. No distinction or differentiation was intended. In Section 22 of this act of April 26, 1906, Congress intended to, and did, remove the restrictions upon the adult heirs of all deceased Indians, irrespective of whether the heirs took by purchase, or by descent or inheritance, strictly and technically speaking. Any other construction leads to absurdity and leads to injustice, and the line of reasoning adopted to bring about the result insisted upon by counsel for complainant and the intervenor must result in the court holding that heirs taking by purchase, and not by technical inheritance, acquired the lands without any limitation or prohibition against alienation. We do not believe it was the intention to exempt heirs taking by purchase from the restrictions against alienation. Yet, strictly and technically construed, the court would have to hold that heirs taking by purchase were never under any disability or restriction against alienation.

That Congress intended by Section 22 of the Curtis Bill to remove the restrictions upon heirs, regardless of how the heirs acquired the land, is evidenced by the provisions of Section 5 of the same act.

Section 5 is as follows:

> "Sec. 5. That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in the name of the allottee, and if any such allottee shall die before such patent or deed becomes effective, the title to the lands described therein shall inure to and vest in his heirs,

and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, *as if the patent or deed had issued to the allottee during his lifetime, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect;* and all patents or deeds to allottees and other conveyances affecting lands of any of said tribes shall be recorded in the office of the Commissioner to the Five Civilized Tribes, and when so recorded shall convey legal title, and shall be delivered under the direction of the Secretary of the Interior to the party entitled to receive the same: Provided, the provisions of this section shall not affect any rights involved in contests pending before the Commissioner to the Five Civilized Tribes or the Department of the Interior at the date of the approval of this act."

Here is a plain legislative declaration that the heirs shall take "as if the patent or deed had issued to the allottee during his lifetime," which confirms fully and completely our argument throughout this case, that the statute of descent and distribution of Arkansas is to be applied just as if Andrew J. Berryhill had died the owner of the allotment. It further demonstrates conclusively our argument as to the construction of Section 22 of said Act, and confirms our contention that restrictions were removed upon the adult heirs of all deceased Indians, irrespective of how the lands were acquired—whether the heirs took by purchase, or by descent or inheritance, strictly and technically speaking.

This Section 5 says plainly: "And all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect," referring to the patents issued after the death of the allottee from whom restrictions had been removed.

In this Section 5 Congress absolutely destroyed all differences and all distinctions that might otherwise have been made between heirs taking by purchase, and heirs taking by descent, technically speaking.

Section 5 is highly important, not only in construing Section 22, but is also important in determining the question discussed in

the first part of this brief; that is, whether the heirs are to be nominated and their shares and portions fixed by the Arkansas statute in the same manner as the shares and portions are fixed by the statute where the heirs take, technically, by descent. We therefore insist that whatever title George Franklin Berryhill had in this land was divested out of him on June 5, 1906, and vested in Edmond and Perry McKay, defendants, by the deed executed and delivered to them on that date by George Franklin Berryhill and wife. The bill of intervention filed in this case by George Franklin Berryhill should be dismissed at his cost and the decree of the lower courts affirmed.

Third Proposition.

Assuming that George Franklin Berryhill, the father, was the owner of the fee, and that the lease executed by him to complainant was in all respects in accordance with law and the rules and regulations of the Secretary, defendants contend that Edmond and Perry McKay bought the land on June 5, 1906, and paid a valuable consideration therefor, without any notice of any kind or character of the lease executed prior thereto by George Franklin Berryhill to complainant. The defendants contend that the title, whatever George Franklin Berryhill had, passed, by virtue of said deed on June 5, 1906, to Edmond and Perry McKay as innocent purchasers, and that the lease executed by them to Arthur B. Reese on October 12, 1906, with its subsequent assignments to Kiefer Oil and Gas Company, operated to vest in the Kiefer Oil and Gas Company, as lessee, whatever rights could be conferred upon it by the owner of the title formerly held by George Franklin Berryhill. In short, we contend that the McKays were innocent purchasers and that the subsequent approval of the lease by the Secretary of the Interior on April 21, 1907, could not operate prejudically to their rights in any aspect. In answer to this contention, complainant's counsel put forward two points, to-wit:

First. That the filing of the lease in the office of the United States Indian Agent, at Muskogee, on April 21, 1906, operated as a *matter of law* to conclusively charge prospective purchasers of the land with notice of the said lease to complainant.

Second. If they be incorrect in this, they then insist that the rules and regulations of the Secretary of the Interior required the filing of leases upon lands of Creek citizens with the Indian Agent at Muskogee for his recommendation as a part of the procedure necessary to reach the Secretary and obtain his approval; that such rules and regulations were currently known to the general public, especially to those engaged in the oil business; that a party desiring to buy lands of an allottee or heirs knew that he could obtain from the office of the Indian Agent at Muskogee information by inquiry, as to whether or not a lease had been formerly executed upon the land and was pending for action by the Secretary, or had been acted upon by the Secretary, and that with knowledge that the Indian Agent's office was a source of information, a prospective purchaser, in good faith, and in the exercise of proper diligence and caution, would make inquiry at the Indian Agent's office, and if he failed to make inquiry he was guilty of negligence and bad faith, destroying his status as an innocent purchaser.

Third. That Edmond McKay and Perry McKay had actual notice of the pendency of the said lease.

Fourth. That the other parties, including Arthur B. Reese, lessee of the McKays, had actual notice.

The first contention put forward by complainant's counsel involves purely a question of law, while the second, third and fourth involve purely questions of fact.

There has been a great deal of confusion and discussion by writers and courts in regard to actual and constructive notice. We shall not undertake to point out at length the distinction. After reading a great many authorities and a great many decisions, we conclude that Pomeroy has laid down the proper distinction in a few words.

We shall first discuss contention number one, made by complainant's counsel,—that is, that the filing of the lease in the Indian Agent's office operated as a species of constructive notice, as a matter of law. To properly discuss this it will be necessary to distinguish between actual and constructive notice.

Constructive notice is a conclusive presumption of law, not rebuttable by any evidence. Constructive notice may not be knowledge. Constructive notice is purely a presumption of law, such as the notice prescribed by statutes providing for the registration of deeds and instruments involving the title of land.

Wade on Notice, Sections 39 and 40.
Pomeroy's Equity Jurisprudence, 592 to 595.

Actual notice has been confused with constructive notice where actual notice has been *implied,* or presumed as a matter of fact. In a very few words Wade draws this distinction:

> "Constructive notice is thus a conclusive presumption or a presumption of law, while implied notice is a presumption of fact. If this distinction were carefully preserved by writers upon this subject, it would enable us to escape a good deal of confusion in regard to the subject of notice."

Wade on Notice, Section 42, says:

> "When notice depends upon an inference of fact, it is where the party to be charged might have gained knowledge by the exercise of due diligence. When it depends upon an inference of law, he will be charged, though actual knowledge was utterly beyond his reach. *The inference of fact may be overcome, or qualified by other facts. The inference of law is final.*"

The question, therefore, for consideration is this, was the filing of complainant's lease in the office of the Indian Agent at Muskogee on April 21, 1906, and its pendency there on June 5, 1906, without approval by the Secretary, constructive notice to Edmond and Perry McKay? That is, was it notice as a matter of presumption of law? Was it notice like a registration of a deed or mortgage or other instrument affecting title to land? Counsel for complainant contend that it was, and in support of their contention in the lower courts cited *Lomax* v. *Pickering,* 173 U. S., p. 26, as authority to sustain their contention that the pendency of the lease in the Interior Department for approval was constructive notice. This is a very important case and was first before this court in 1892, and reported in 145 U. S., p. 310 (36 L. Ed. 717). The

decision of the lower court was reversed by this court on the first trial, the argument having been made that the approval by the president 13 years after the date of the deed was a nullity, because the act requiring the permission of the president, required that his permission be given concurrently with the execution and delivery of the deed. This court held otherwise, and decided that the subsequent approval 13 years thereafter related back to the date of the deed, and gave the instrument effect from and of the date of its execution and delivery. Upon a new trial the defendant below relied upon the chain of title back to the Indian allottee. The deeds and their dates were as follows:

Horton's Title.

1. Deed to Horton, on August 3rd, 1858;

2. Horton's deed was recorded on July 16th, 1861, in the proper recording office of the county in which the land was situated in the State of Illinois;

3. Horton's deed was approved by the president, January 21st, 1871.

M'Clure's Title.

1. McClure took a deed February 22nd, 1870, 12 years after Horton's deed. This deed to McClure, it will be noticed, was taken 9 years after Horton's deed had been recorded in the proper recorder's office in which the land was situated, in the State of Illinois.

2. McClure's deed was recorded in the recorder's office in the county in which the land was situated, March 11, 1871, nearly ten years after the recording of the former deed.

3. McClure's deed was approved by the President, February 24th, 1871, over 30 days after the prior deed had been approved by the President.

The court will just here recall the argument of appellant's counsel, that the departmental lease was not eligible to registration, although complainant had thirty days after its execution to record it.

The Supreme Court of Illinois, and this court both held that Horton's deed was eligible to registration, although not approved by the President, and both courts held as stated in the syllabus, that the record of a deed from an Indian without the approval of the President, which is necessary to constitute a valid conveyance, is notice to subsequent purchasers, under the Illinois Conveyancing Act. That is exactly what was not done in this case. The complainant, Albert W. Shulthis, did not put of record in the office of the United States Clerk as *Ex-officio* Recorder, the lease taken by him from George Franklin Berryhill. If the complainant had recorded his lease at Sapulpa in the recording district in which the land is situated, then the record of such lease would have been constructive notice under this decision of this court in *Lomax v. Pickering*. The Supreme Court of Illinois and this court both held that it was unnecessary to record the approval of the President, upon the ground that "*the approval of the President was not a part of the deed.*" Both the Supreme Court of Illinois and this court held that the "record of the approval of the President in the Department at Washington, was notice to all concerned *from the time it was made*, and we do not think that the recording laws of the state require a copy of that record to be recorded in the recorder's office where the land is located. A record of that character (that is, a record of the approval), is similar to a patent issued by the President for lands that belong to the government, which is not required to be recorded in the county where the land is located."

Take it word for word, and the holding in the Lomax case is simply no more nor less than that the record of the approval of the President in the Department at Washington, is notice to all concerned *from the time it is made*. It is not necessary under these decisions to record the approval in the recorder's office where the land is located, because it was no part of the deed, but there is nothing in this opinion of this court to the effect that such a deed was constructive notice before its approval, unless the deed was of record in the recorder's office in the county where the land is located. Bear in mind that the record of the approval is only constructive notice, from the date it is made. The defendants, Ed-

mond and Perry McKay, in the case at bar, purchased this land, paid for the same and received a general warranty deed therefor, several months before the lease in question was approved, or any record of such approval ever made. Therefore it is absolutely impossible for the defendants to be charged with constructive notice of a thing that was not in existence—of a record not made until many months thereafter.

The court simply holds that the recording laws did not apply to the approval (because it was no part of the deed), and that is all. Complainant's counsel cannot put their hand on a single decision holding that the recording laws in force in the Indian Territory did not apply to the lease before its approval.

Further on Constructive Notice.

There is one thing absolutely fatal to complainant's contention that the records in the department were constructive notice, and that is this: After the ratification of the Original Agreement with the Creeks in 1901, and after the approval of the Supplemental Agreement in 1902, Congress, in February, 1903, passed an act entitled, "An act providing for the record of deeds and other conveyances and instruments of writing in Indian Territory, and for other purposes." Said act of Congress passed in February, 1903, put in force in the Indian Territory Chapter 27 of Mansfield's Digest of the Statutes of Arkansas, and provided that the clerk or the deputy clerk of the United States Court of each of the courts of the said territory, shall be ex-officio Recorder for his district, and perform the duties required of recorders in said chapter of Mansfield's Digest. The said act of Congress further provided:

> "It shall be the duty of each clerk or deputy clerk of such court to record in books provided for his office, *all* deeds, mortgages, deeds of trust, bonds, *leases*, covenants, defeasances, bills of sale, and other *instruments* of writing *concerning lands*, tenements, goods and chattels, and where such instruments are for a period of time limited on the face of the instrument, they shall be filed and indexed," etc. (32 Stat. at L. 841).

As heretofore pointed out the United States Court of Appeals for the Eighth Circuit has held that the statutes put in force in the Indian Territory are to be construed and treated as acts of Congress, that is, treated as if set out in *haec verba*.

Leak Glove Mfg. Co. v. *Needles*, 69 Fed. Rep. 69.

This being true, we turn to Chapter 27 of Mansfield's Digest, and find the following:

> "Sec. 670. Every deed, bond or instrument of writing, *affecting* the title in law or equity to any property, *real* or personal, within this state (Indian Territory), which is, or may be, required by law to be acknowledged, or proved and recorded, shall be constructive notice to all persons from the time the same is filed for record in the office of the recorder of the proper county; and it shall be the duty of such recorder to indorse, on every such deed, bond or instrument, the precise time when the same is filed for record in his office."

This section expressly makes the record of any instrument of writing affecting the title in law or equity to any property, real or personal, in the Indian Territory, constructive notice to all persons from the time the same is filled for record in the office of the clerk of the United States Court, who is ex-officio recorder, and records of instruments affecting real estate recorded in the clerk's office are the only records made constructive notice to purchasers by act of Congress. The express mention of the clerk's office, excludes by necessary implication, the office of the Indian Agent, under the well known rule of statutory construction, that the "express mention of one thing excludes all others."

Sutherland Statutory Construction, Volume 2, Section 492.

Not only by the above section just quoted is the office of the Indian Agent excluded by necessary implication, but Section 671 of Mansfield's Digest, put in force by said act of Congress, expressly excludes the Indian Agent's office. Section 671 is as follows:

"Section 671. No deed, bond, or instrument of writing, for the conveyance of *any real estate,* or by which the title thereto may be *affected* in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser of such real estate for a valuable consideration, without actual notice thereof; or against any creditor of the person executing such deed, bond, or instrument, obtaining a judgment or decree, which by law may be a lien upon such real estate, unless such deed, bond or instrument, duly executed and acknowledged, or approved, as is or may be required by law, shall be filed for record in the office of the clerk and ex-officio recorder of the county where such real estate may be situated."

This section expressly says that no deed, bond, or instrument of writing for the conveyance of *any real estate,* or by which the title thereto may be *affected* in law or equity, unless filed in the clerk's office, shall be good or valid against a *bona fide* purchaser without actual notice. It seems to us that these two sections are absolutely determinative of the question. Section 671 above set out is as much an act of Congress as if it had been set out by Congress word for word, and under its provisions the office of the Indian Agent is excluded as a place of record.

Counsel for complainant cites Section 20, of the Act of Congress approved April 21, 1906 (34 Stats. at Large 137), as a legislative construction of the prior law, and argue therefrom that Congress presumed the recording laws in force in the Indian Territory were not applicable to departmental leases. That section says:

"That after the approval of this act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, or full blood allottees etc., shall be in writing and subject to the approval of the Secretary of the Interior etc."

It might just as well be argued that Congress presumed that the Statute of Frauds was not in force in the Indian Territory, inasmuch as this section requires rental contracts for a period of

time over one year to be in writing. Yet Congress in 1890 (26 Stats. at Large, Chapter 182, page 81), adopted and put in force in Indian Territory the Statute of Frauds in force in the State of Arkansas, and the Statute of Frauds then put in force required such leases to be in writing. The fact that this Section 20 provided, "that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory," is nothing further than a declaration of the existing law, just as the requirement that leases for a period beyond one year be in writing was a declaration as to the existing law.

We can not see how complainant can get any comfort from Sec. 20, of that act. From then on Complainant's lease was undoubtedly subject to the Arkansas Recording Law.

The McKays did not buy the land till June 5th, 1906, and certainly complainant had lots of time before that to record his lease.

The contention that the recording laws had no application to this lease is settled by the express provisions of certain Acts of Congress. In the first place departmental leases were not excepted from the provisions of the recording law by the Act of Congress approved February 19, 1903 (32 Stats. at Large 841). A great many of the laws in force in the Indian Territory, and a great many of the Acts of Congress pertaining thereto will be found in Congressional Appropriation Bills and various miscellaneous legislation. If there was ever any doubt about the recording laws applying to Indians and to leases of this character, it was clearly removed by the Act of Congress of April 28, 1904 (33 Stats. at Large 573), the second section of which Act is as follows:

> "All the laws of Arkansas heretofore put in force in the Indian Territory are hereby continued and extended in their operation so as to embrace *all persons and estates* in said territory whether Indian, freedmen or otherwise, and full and complete jurisdiction is hereby conferred upon the district courts in said territory in the settlement of all estates of decedents, the guardianship of minors and incompetents, whether Indians, freedmen or otherwise."

The argument is made by complainant's counsel that Mr. Leupp, Commissioner of Indian Affairs, rendered a decision to the effect that the pendency of a lease in the office of the Indian Agent at Muskogee was constructive notice to purchasers, and they insist that the construction of the law by the executive officers of the government should not be ignored by the courts, except for cogent reasons. We concede that the courts have held that the construction of a doubtful statute by the executive department is entitled to weight, and should not be set aside except for cogent reasons, but we must inquire here what statute Mr. Leupp was construing when he rendered his opinion? His opinion was given as a construction of no statute or act of Congress. He does not mention any act of Congress in his opinion, nor does he undertake to construe any act of Congress on the question of notice. But these decisions of the courts holding that a construction by the executive department of ambiguous acts are entitled to respect by the courts, were decisions construing acts of Congress submitted to the executive branch of the government for its execution and enforcement. Mr. Leupp's opinion was not written by him in the execution or enforcement of any act of Congress; his opinion was a mere gratuity, delivered at the request of Congressman Scott, for submission to Congress. Mr. Leupp was not construing an act of Congress with a view to determining his course thereunder, as a part of the executive branch of the government. His opinion was not given in any case or controversy pending before the Department of the Interior. But after all it seems that Congress differed very much with Mr. Leupp in his opinion. Congress absolutely ignored Mr. Leupp's opinion, and immediately passed a law making the pendency of a lease in the Indian Agent's office constructive notice. This act of March 1st, 1907, overruled Mr. Leupp's opinion and is a legislative construction of the existing law. Mr. Leupp is not a lawyer, and has not even been vaccinated as such. When Congress passed that act, it thereby declared that prior thereto the pendency of a lease in the Indian Agent's office at Muskogee was not constructive notice to prospective purchasers.

A legislative construction is high evidence entitled to great weight.

United States v. *Moore,* 161 Fed. 519.
Tiger v. *Western Inv. Co.,* 221 U. S. 286.

The Act of March 1st, 1907 (35 Stats. at L. 1015), provides:

"The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

Further as to Constructive Notice.

Complainant's counsel argue that the law, either expressly or by implication, authorized the Secretary of the Interior to make rules and regulations for the filing of departmental leases in the Indian office, etc.

No act of Congress conferred upon the Secretary of the Interior any express authority to prescribe rules and regulations governing the leasing of lands for oil and gas mining purposes in the Creek Nation till act approved May 27, 1908, Sec. 2 thereof (35 Stats. at Large, p. 312). Complainant's counsel, however, insist that the Secretary of the Interior had such authority by implication. We have never denied that the Secretary had such authority by implication to prescribe rules and regulations governing the leasing of these lands for oil and gas purposes by the allottees. But we strenuously insist that the Secretary has no authority by implication to prescribe rules and regulations which will have any binding force or effect outside of the domain of his department. By implication he has a right to prescribe rules and regulations by which the method of obtaining a lease is laid down, or by which the *mode of procedure* of obtaining a lease must be followed. The rules and regulations prescribed by the Secretary of the Interior must be limited in their effect to the administrative power conferred upon him as a branch of the executive department of the government. Where the secretary is authorized to prescribe rules and regulations by act of Congress, then such

rules and regulations, provided they do not invade the field of legislation, have the binding effect of law. The case of the *United States* v. *Bailey* is not in conflict with this position. The indictment in the Bailey case was predicated upon an act of Congress which provided that:

> "If any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall, upon conviction thereof, suffer as for wilful and corrupt perjury."

The indictment charged false swearing in an affidavit made by the defendant before a justice of the peace of the commonwealth of Kentucky, in support of a claim against the United States. The Secretary of the Treasury was acting under an act of Congress entitled, "An act for the prompt settlement of public accounts, and for the punishment of the crime of perjury." The act of Congress also provided, "that the Secretary of the Treasury be, and he is hereby directed and required to adjust and settle these claims for half pay of the officers of the aforesaid regiment and corps which have not been paid; which several sums of money herein directed to be paid or settled, shall be paid out of any money in the treasury not otherwise appropriated by law." The Secretary of the Treasury, by rule and regulation, required the claims to be verified by oath, and provided by rule that said oath may be taken before a justice of the peace in a state. The point was made that the justice of the peace was not an officer of the United States and that an affidavit made before him was not perjury, because the oath taken was in law and in fact not an oath. Bear in mind that the act of Congress upon which the indictment was predicated provided that "if any person shall swear or affirm falsely touching the expenditure of public money, or in support of any claim against the United States, he or she shall upon conviction thereof, suffer as for wilful and corrupt perjury." Justice Story, in speaking for this court said:

> "It is unnecessary to consider in this case, whether an oath taken before a mere private or official person, not authorized to administer oaths generally, or in special cases,

or not specially authorized, recognized or allowed by the regulations of practice of the Treasury Department as competent to administer an oath in support of any claim against the United States, would, though the claim should be admitted or acted upon in the Treasury Department, under such a supposed sanction, be within the provisions of the act of 1823. This question may well be reserved for consideration until after they arrive directly in judgment. In the present case, the oath was administered by a state magistrate, having the admitted authority under the state law to administer oaths, *virtute officii*, in many cases, if not in the present case; and it is further found in the case that there was evidence at the trial conducing to prove, and for the purposes of the present argument it must be taken as proved, that the Secretary of the Treasury did establish a rule authorizing affidavits made before any justice of the peace of a state *to be received and considered* in proof of claims under the act of 1823; so that the solution of the question in the above issue depends upon this, whether the oath, so administered under the sanction of the Treasury Department, is within the true intent and meaning of the act of 1823. Admitting, for the sake of argument, that it is true (on which, however, we express no opinion), that a state magistrate is not compellable to administer oaths, *virtute officii*, under the law of the United States, which expressly confers power on him for that purpose, still, if he choose to administer an oath under state law, there can be no doubt that it would be a lawful oath by one having competent authority, and as much so as if he had been specially appointed a Commissioner under the law of the United States for that purpose. And we think that such an oath, administered under such circumstances, would clearly be within the provision of the act of 1823. That act does not create or punish the crime of perjury, technically considered. But it creates a new and substantive offense of false swearing, and punishes it in the same manner as perjury. The oath, therefore, need not be administered in a judicial proceeding, or in a case of which the state magistrate, under the state law, has judicial jurisdiction, so as to make false swearing perjury. It would be sufficient that it may be lawfully administered by the magistrate, and was not in violation of his official duty."

The court then goes on to say that:

> "The next inquiry naturally presented is, whether the Secretary of the Treasury had an implied power to require, authorize, allow or admit any affidavit sworn to before a state magistrate in proof or in support of any claim under the act of 1823."

The court held that the Secretary did have such implied power under the act directing and requiring the Secretary to adjust and settle these claims for half pay of the officers, etc. But this court in that case did not hold or intimate that the Secretary had implied power to *require* or *direct* a state magistrate to administer oaths to claimants making affidavits in regard to claims submitted by them to the Secretary of the Treasury under said act of Congress of 1823. The court simply held that the Secretary had the implied power to prescribe the rules and regulations governing his own procedure and the method and mode of presenting these claims to him for his official action. If the Secretary of the Treasury had undertaken to make a rule requiring and directing a state magistrate to administer such oaths, then he would have been invading the provinces of the legislature. But so long as he confined his rules to the conduct of his own administrative department, he was in the domain of his implied power. This court in a later case, that of the *United States* v. *Eaton*, 144 U. S. 677-688; 36 L. Ed., 591, held that an Internal Revenue Commissioner, although authorized by Congress to prescribe rules and regulations with the approval of the Secretary of the Treasury, could not prescribe a rule requiring a wholesale dealer to keep a book showing the oleomargarine received by him or from whom received. This court in that case, speaking through Justice Blatchford, said:

> "It was said by this court in *Morrill* v. *Jones*, 106 U. S., 466 (*27-267*), that the Secretary of the Treasury cannot by his regulations alter or amend the revenue law, and that all he can do is to regulate the *mode of proceeding or carrying into effect what Congress has enacted.*"

Accordingly, it was held in that case, under 2505 of the Revised Statutes, which provided that live animals specially imported

for breeding purposes from beyond the seas, should be admitted free of duty upon assurance satisfactory to the Secretary of the Treasury and under such regulations as he might prescribe, "that he had no authority to prescribe a regulation requiring that before admitting the animals free, the collector should be satisfied that they were of *superior stock*, adapted to improving on the breed in the United States. Much more does this principle apply to a case where it is sought substantially to prescribe a *criminal offense* by the regulation of a department." In a much later case, decided in 1904, this court in discussing the rules and regulations prescribed by the Secretary of the Interior, under an act of Congress expressly authorizing the Secretary to make rules and regulations in regard to the felling and use of timber on the public lands, held that the Secretary had no authority to prescribe a rule legislative in its effect. The court said:

> "If rule 7 is valid, the Secretary of the Interior has power to abridge or enlarge the statute at will. If he can define one term, he can define another. If he can abridge, he can enlarge. Such power is not a regulation: it is legislation. The power of legislation was certainly not intended to be conferred upon the Secretary."
>
> *United States* v. *United Verde Copper Co.*, 196 U. S., 205-207; 49 L. Ed., 449-453.

These decisions confirm our argument and contention that the Secretary of the Interior has no authority either by express act of Congress or by implication, to prescribe any rule or regulation, except such rules and regulations as are administrative in their effect, and governing and controlling alone the method and procedure by which oil and gas leases are to be presented to him for his approval. An act of Congress authorizing him to prescribe rules and regulations would not have conferred upon him any power to have prescribed a rule declaring the filing of a lease in either the Indian Office or in the office of the Department at Washington, constructive notice to purchasers of the fee. The Secretary's action on all of these leases is purely a matter of discretion with him, and he unquestionably had authority to prescribe

rules and regulations governing the procedure and mode of presenting these leases to him for his action. We have never denied that. But we do insist that he had no authority to make any rule or regulation which could bind or affect the purchasers of the land from those entitled to convey.

As we see this case, however, all of this argument is irrelevant for the simple reason that the Secretary did not by any rule and regulation declare, or undertake to declare, the filing of a lease in the Indian Agent's office, or the pendency of a lease before him for his approval, constructive notice to prospective purchasers of the fee. Not having undertaken to prescribe such a rule, the action of the Secretary and his rules are irrelevant and immaterial.

Counsel for appellant, Shulthis, say in their brief on page 81:

> "We submit that it would be absolutely impossible for the appellant to have protected himself if the recording laws put in force in Indian Territory on February 19, 1903, be held applicable to Departmental leases. In other words, it would have been utterly impossible for the lessee, Shulthis, to have complied both with the provisions of the Supplemental Creek Agreement and the rules and regulations of the Secretary of the Interior on the one hand, and the provisions of the Arkansas recording laws on the other. This being so the conclusion is irresistible that the recording laws of Arkansas spread over the Indian Territory by the Act of February 19, 1903, 'so far as applicable,' have no application to appellant's departmental lease; that therefore the lease being prior in point of time to the deed under which the appellees claim, is prior in effect."

This remarkable statement is neither sustained by the law or the facts. Neither do counsel undertake to show why it was impossible, or even inconvenient, for the appellant to comply with the recording laws.

The rules and regulations set out in the Bill (Record, page 11), allowed the lessee thirty days after the date of his lease in which to file the lease in the office of the Indian Agent, Union Agency, Muskogee, for transmittal to the Secretary for his action.

Certainly thirty days was sufficient time to enable complainant to have his lease filed and recorded in accordance with the Arkansas recording act. There was no rule or regulation of the Secretary prohibiting recording the lease, and nothing whatever to indicate that the Secretary had the slightest objection to such lease being recorded prior to the filing of the same in the office of the Indian Agent. On page nine of the record will be found this regulation of the Secretary:

> "Section 8. No lease or deed will be approved that is executed prior to the approval and delivery of the deed to the allottee. Annexed to these regulations are forms of petition, deed, certificate of officer taking acknowledgment, affidavit of witnesses, grantor's affidavit, grantee's affidavit, certificate of officer who appraised the land, *lease*, bond and affidavit of surety,which forms must be followed in all cases. All deeds and leases will be transmitted by the Indian Agent, or other proper officer in charge, through the proper channels for the Secretary's approval."

This rule would clearly indicate that a certificate of acknowledgment attached to the lease or deed was not only not objectionable, but entirely proper. Counsel for complainant impute to the Secretary a tyrannical and nonsensical rule not found in any of the printed or promulgated rules and regulations—that is, they intimate that the Secretary would be so arbitrary and captious as to refuse to consider a lease that had been acknowledged and filed for record in the proper recording district prior to its filing in the office of the Indian Agent. Certainly such contention and such suspicions are wholly unwarranted and unworthy of serious consideration.

The nearest analogy to the position of complainant's counsel in this case is that of an instrument of writing, deed or mortgage, actually of record in the recorder's office in the county in which the land is situated, yet ineligible to registration. Such deed or mortgage, although actually of record, if not eligible to registration, is not constructive notice to subsequent purchasers unless it is shown by the proof that such subsequent purchaser had actual

knowledge of such unrecorded deed or mortgage, or had seen such deed or mortgage on record. The authorities are unanimous in holding that a deed or instrument not eligible to registration, although on the record, is not notice.

Wade on Notice, 112-124-125.
45 Am. Rep. 189.
2 Pomeroy Eq. Jur., Secs. 652-653.

See also many cases cited in Vol. 1, Crawford's Digest of the Supreme Court decisions of Arkansas, page 11.

Our deed was taken and recorded long before the complainant's lease was approved and recorded.

The courts will not charge a purchaser of land from citizens where restrictions were removed with constructive notice of leases pending in the office of the Indian Agent, before the said act of March 1st, 1907. It is shown by the proof in this case that no information would be given out to the inquiring public as to the lessee or anything about the lease, except that a certain tract of land had been leased or not leased. The public was not permitted to examine the records, see the records, or investigate the records. A lease in the office of the Indian Agent was not, in fact, or in law, a public record. It was a private record and kept very privately by the officials. *The officials were not under obligation, officially, by any act of Congress or rule of the Secretary of the Interior, to even give out information as to whether a tract of land was leased or was not leased. What little information the officials in charge of the Indian Agent's office did give out, was voluntary and gratuitous, and not official. The public had no means of forcing any information from the Indian Agent's office as to whether a lease was pending or not pending. There was no act of Congress making such leases public records. There was no rule or regulation of the Secretary making such leases public records. An inquiring citizen could not by any procedure in court, by mandamus or otherwise, force open the doors of the Indian Agent's office, to their inspection, or force from the Indian Agent's office any information as to whether a lease was pending or not pending.*

What information the officials did give out was voluntary and *not official.* Therefore, the pendency of a lease in the Indian Agent's office was not a public record, and we do not believe that any court will ever hold that the public,—prospective purchasers, are in equity and good conscience to be charged with constructive notice of an instrument not a public record—not open to their inspection,—not subject to their investigation.

Purchasers or lessees of lands are not chargeable with notice of defects in the titles shown by the records in public offices of the county or state, unless such public offices are by law designated as recording offices. The records of the county commissioner's court showing the sale of real estate are not such public records as charge a subsequent purchaser with conclusive knowledge thereof. An unrecorded administrator's deed, in the absence of actual notice thereof, or of the proceedings under which it was obtained, is not such constructive notice as will invalidate the title of a subsequent *bona fide* purchaser.

Anthony v. *Wheeler,* 130 Ill. 128; 17 Am. St., Rep. 281.
Bourland v. *County of Peoria,* 16 Ill. 538.

Actual Notice.

Having discussed fully the proposition of constructive notice —that is, notice by conclusive presumption of law, we will discuss the question of actual notice.

Did Edmond McKay and Perry McKay, defendants, have actual notice on June 5, 1906?

Before discussing the evidence introduced by the parties on this issue we should determine upon whom rested the burden of proof. The McKays paid to George Franklin Berryhill for this forty acres of land, and about thirty other acres, a cash consideration of two thousand dollars. This cash consideration was paid at the time the deed was delivered. There is no contention in this record that the two thousand dollars was not paid. Complainants' own witnesses prove that fact.

There is a conflict of authority on the question of burden of proof insofar as determining upon who, in the first instant, the

burden rests. One line of authorities holds that inasmuch as the plea of *bona fide* purchaser for value and without notice is an affirmative defense, the party pleading it must sustain his position by the burden of proof. On the other hand, the authorities hold that in the absence of evidence to the contrary the law will presume a grantee or lessee to be a *bona fide* purchaser because fraud is not presumed by the law, and that, therefore, the burden of proof rests upon the party undertaking to impeach the conveyance or subsequent lease. It is unnecessary to straighten out this conflict of authority so far as this case is concerned. The correct rule and the just rule shifts the burden of proof to the complainant in this case immediately upon the evidence conclusively showing that Edmond and Perry McKay paid George Franklin Berryhill the cash consideration of two thousand dollars at the time the deed was delivered to them. After having proven the payment of the consideration the McKays are required to go no further. The burden of proof shifted to the complainant and it was necessary for the complainant to show by clear and convincing evidence that the McKays had notice of his lease at the time they purchased the land from Berryhill, paid the consideration, and received their deed.

23 Am. & Eng. Enc. L. 2nd Ed., p. 523.

In *Crane Nest Coal and Coke Co.* v. *Virginia Iron Coal and Coke Co.*, 62 S. E. Rep. 954, the Supreme Court of Appeals of Virginia said:

> "The burden of proving notice to a purchaser for value is on the party alleging it, and, while the fact of notice may be inferred from circumstances, as well as proof by direct evidence, yet the proof must be such as to affect the conscience of the purchaser and must be so strong and clear as to fix upon him the imputation of *mala fides*."

In *Marshall* v. *Dunham*, 66 Me. 539, the court clearly held that a strong suspicion is not sufficient, but the evidence must be clear and undoubted to charge the purchaser with notice of title in a third person.

In *Anthony* v. *Wheeler,* 130 Ill. 128; 17 Am. St. Rep. 281, the court said:

> "The presumption is that she is a *bona fide* purchaser and the burden of proof to show bad faith or want of consideration is upon appellee."

In *Vest* v. *Michie,* 31 Gratt., 149; 31 Am. Rep. 722, the Supreme Court of Appeals of Virginia said:

> "Whilst it is held that the fact of notice may be inferred from circumstances, as well as proved by direct evidence, the proof must be such as to affect the conscience of the purchaser, and must be so strong and clear as to fix upon him the imputation of *mala fides.*"

In the annotated note of *Anthony* v. *Wheeler,* 17 Am. St. Rep. 288, Mr. Freeman, the annotator, says:

> "On the question involved in the principal case as to whether or not a subsequent purchaser, under a deed, is presumed to be a *bona fide* purchaser for value without notice, the authorities are somewhat conflicting. The great weight of authority, however clearly establishes the doctrine that one claiming title to land and by a deed to him purporting to be made for a valuable consideration is presumed to be a purchaser in good faith without notice of prior unrecorded deeds until the contrary is shown; and that the burden of proof to show *notice* and want of *good faith* is on the party attacking the deed."

Whether the burden of proof in the first instance is on the plaintiff or defendants, in this case is immaterial. The equitable and fair rule is that upon proof of payment of a valuable consideration the burden of proof at once falls upon the other party, the complainant in this case, to prove by clear and convincing evidence, either direct or circumstantial, that the McKays had notice of complainant's lease.

Complainant's counsel introduced George Franklin Berryhill to prove actual notice. The questions on the examination in chief are as follows:

Q. In the answer filed by the defendants in this case there is set up as an exhibit to the answer a deed executed by you and your wife to Edmond and Perry McKay? A. Yes, sir.

Q. The deed covering this land? A. Yes, sir.

Q. At the time of the execution of that deed, did you or not advise them that there was an oil and gas lease on the land in controversy in this suit? A. Yes, sir; I did (Record, page 111).

On cross examination, George Franklin Berryhill states positively that he did not know Albert W. Shulthis, and did not know the lease was being taken in the name of Albert W. Shulthis, the complainant. He says McIlwane and Cheney took the lease, and that he did not know who the lessee was, but thought it was McIlwane.

Q. Did he read it as made to Shulthis? A. Well, if he did, I don't remember it.

Q. Well, you did not know who you were making the lease to? A. Well, now, to simmer right down to the facts, I didn't.

Q. Your impression was, though, that you were making the lease to McIlwane? Was it? A. Yes, sir.

Q. When was the first time you ever heard of Albert W. Shulthis? A. When I brung a contest suit against him (Record, page 113).

George Franklin Berryhill also testifies that the price or consideration was two thousand dollars for this land and thirty other acres; that the McKays paid him $400.00 down at the time of the trade, and withheld the remainder of the consideration for the purpose of investigating the title.

Further from his testimony:

Q. Just go ahead and tell what you told them at the time you made this trade? A. Well, I didn't tell a great deal about it; I told them they had an oil and gas lease on it, and at the time I didn't believe it was any good, and I believe that was all.

Q. Did you tell them why you didn't believe it was any good? A. Yes, sir.

Q. Why did you tell them? A. Because they come back and wanted me to change my woman's name, and I didn't do it.

Q. Did you tell them who took that lease? A. Told them who took it.

Q. Who did you tell them? A. McIlwane and Cheney.

Q. Did you know what kind of lease it was? A. Supposed it was an oil and gas lease.

Q. That was all you knew about it? A. Yes, sir.

Q. Well, when you told them that there had been an oil and gas lease made on it by you, and that you did not believe it was any good, they then told you they would have to investigate the record before they would pay the rest of the consideration, didn't they? A. They told me they had to get an abstract.

Q. And that was the reason why they did not pay the other $1,600, was it? A. They didn't say; they told me they would pay the $400 down and pay the other in a few days, and I found out they got an abstract (Record, page 114).

George Franklin Berryhill admits that he made an affidavit on July 15, 1907, in which he stated as follows:

> "That this affiant informed the said McKays that at the time of the execution of said warranty deed, in the opinion of this affiant that no oil and gas lease of any kind was upon said land. Affiant further states that prior to the execution of said deed that he told the said McKays that he and his wife had given some kind of lease paper to one McIlwane, but that they were of no force or validity, and that the said McIlwane came to this affiant several times to get said papers properly executed upon proper blanks, which said affiant refused to do."

He further states in this affidavit that the McKays had had an abstract prepared before they paid him for the land. And he also says that he never heard of Albert W. Shulthis until long after he had deeded the land to the McKays. Giving full weight and a liberal construction to his evidence, George Franklin Berryhill proves nothing further than the fact that he told the McKays at the time he sold them the land that he had prior thereto executed an oil and gas lease on the land, but that said lease was no good, because the parties had repeatedly come back to him with the request that he sign new papers, suggesting, among other things, the error in his wife's name. The record shows that McIlwane, and especially Cheney, did, upon several occasions, return to

George Franklin Berryhill and ask him to sign other and further papers. George Franklin Berryhill says that he did not know what he had done and did not know what papers Cheney and McIlwane wanted him to sign or execute thereafter. He does conclusively show in his evidence that he derived the well-founded impression that the lease executed prior thereto by him was of no force and validity, because the parties to whom he thought he had made the lease had repeatedly requested him to sign new papers. He says, however, that he told the McKays that he thought the lease was made to McIlwane, but did not mention the name of Albert W. Shulthis, for the reason that he did not know Albert W. Shulthis had anything to do with it.

Both Edmond McKay and Perry McKay positively deny that George Franklin Berryhill told them the name of any person connected with said lease. They positively state that George Franklin Berryhill said he did not know to whom he had made the lease. Without quoting at length from the testimony of Edmond and Perry McKay, we will call the court's attention to the following evidence from the testimony of Edmond McKay:

Q. Now, I will ask you to state what inquiry, if any, you made from George Franklin Berryhill in regard to the title of this forty acres in respect to incumbrances or any lease? A. Well, after we had talked to him about the deal and he had made the price on this land, we asked him if there—asked him—I asked him, if there was anything against this land, if he had made any kind of deal on this land.

Q. Any kind of deal? A. If he had signed any papers, and he said, no, he had not, only he had signed an old lease sometime ago, but it was not any good; he said he knew because the parties he had signed this lease to had come back for him and wanted him to sign new papers.

Q. Did he say what kind of new papers the parties had come back and requested him to sign? A. He said that they said that these papers had been signed up on the wrong forms, or something of that kind. The wrong papers. There was a mistake and they wanted to correct it, and that he had not done it, and that he knew that this was not against the land now, because he had not signed nothing more.

Q. Now, did he tell you to whom he had signed any old lease or any prior papers in regard to this land or against this land? A He did not know who it was to.

Q. Did he say that he did not know who it was to, or didn't remember the name of the lessee? A. The reason I think, he didn't know. He said he had signed papers to somebody and he did not name the party.

Q. Did you ask him the name of the party? A. Yes, sir; but that was the way he answered it, that he did not know—it was to somebody.

Q. Did George Franklin Berryhill at any time during the negotiations for the purchase of this land, or at any time during the month of June, 1906, tell you he had made a lease for oil and gas purposes to a man by the name of McIlwane? A. No, sir; he did not.

Q. Tell whether or not there was anything said by George Franklin Berryhill at the time you bought this land, accepting the deed therefor, and paid the consideration, in regard to a departmental oil and gas lease having been formerly made to anybody? A. There was certainly nothing said about any departmental lease (Record, pages 172-73).

Perry McKay states in his testimony that he was present at the time the trade was made with George Franklin Berryhill, and gives the following detailed history:

Q. Tell what was said by George Franklin Berryhill at that time in regard to there having been formerly made any lease by him and his wife, or either of them, to this land in controversy? A. We asked him if he had ever made any deal on this land, or signed any papers of any kind against the land. He first said that he had not signed any papers, and then he said afterwards that he did sign some kind of papers, but he did not know who they was to or what they meant; and they came back to him and wanted him to sign them over again, but he would not do this, so we went ahead and bartered with him on this trade (Record, page 180).

Q. Did he know, or say he knew, the name of the parties to whom he had made any former lease, or anything of that kind? A. He did not; and I remember of asking him who he had signed the papers with, and he said he did not know.

Q. Did he say anything about the kind of lease; whether it was an oil or gas lease, or oil and gas papers he had signed? A.

From the way he led me to believe I couldn't tell whether he meant it was oil and gas lease, or what it was that he had signed. I did not know but what it might have been a deed he had signed. It was then some time after the restrictions had been removed from these mixed blood heirs (Record, page 180).

Further:

Q. Well, why did you not pay him the whole two thousand dollars at the time you agreed on the trade? A. We told him we would get an abstract on the land, and if everything showed up clear, we would take the land at two thousand, and if it did not show up clear we did not want it.

Q. Did you have an abstract made? A. We did.

Q. Did the abstract show any incumbrance on the land of any kind? A. None at all.

Q. After you got the abstract, what did you do then? A. Paid him the balance of his money (Record, page 181).

Both Edmond and Perry McKay, as well as George Franklin Berryhill, testified that in no conversation between them was a departmental oil and gas lease mentioned; they all agree that George Franklin Berryhill explained to them that the lease he had formerly executed was of no effect, giving as reasons therefor, that the parties had come back and wanted him to execute new papers, claiming there was some error in the originals, which he refused to do.

The record is absolutely void of any testimony showing that Edmond and Perry McKay had any direct *knowledge* of complainant's lease; the record is absolutely void of any evidence showing that George Franklin Berryhill at the time he sold the land to the McKays had any knowledge of his own mind, at that time, that complainant had a departmental oil and gas lease. The only conflict of the slightest importance between the evidence of Edmond and Perry McKay, upon the one hand, and George Franklin Berryhill, upon the other, is the testimony of the McKays that George Franklin Berryhill told them he did not know the name of the parties to whom he had executed the old lease, or papers, while George Franklin Berryhill testifies that he told them he had executed some kind of a lease to a man by the name of McIlwane.

Complainant has therefore unquestionably totally failed to sustain his allegation of actual notice. The McKays had absolutely no knowledge or actual notice. Complainant's counsel, however, invoke the proposition, that "Whatever puts a party upon inquiry amounts, in judgment of law, to notice," but this proposition is modified, and is correctly stated as follows:

> "Whatever puts a party upon inquiry amounts, in judgment of law, to notice, provided the inquiry becomes a duty, and would *lead* to the *knowledge* of the *facts* by the exercise of ordinary diligence and understanding."
>
> 37 Volume Century Digest, page 1467, and cases cited.

In other words, we now turn from the question of actual notice, in the sense of knowledge, to the question of actual notice by implication, or presumption of fact. Were the McKays chargeable with notice or knowledge, as a matter of fact, from the information given to them by George Franklin Berryhill? We think, under the authorities, unquestionably no. Pomeroy says:

> "A purchaser, or persons obtaining any right in specific property, is not affected by vague rumors, hearsay statements, and the like, concerning prior and conflicting claims upon the same property; and the reason is, that such kind of reports and statements do not furnish him with any positive information, *any tangible clew*, by the aid of which he may commence and successfully prosecute an inquiry, and thus discover the real truth. His conscience is therefore not bound."
>
> Pomeroy Equity Jurisprudence, Volume 2, Section 597.

In the same section the learned author says:

> "If, however, it appears that the party obtains knowledge or information of such facts, which are sufficient to put a prudent man upon inquiry, and which are of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly lead to a discovery of the conflicting claim, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry; that he made the inquiry and arrived at the truth."

Both Edmond and Perry McKay positively testify that they are farmers and engaged in farming and stock raising for many years in the Indian Territory; that they never did any oil business; never took any oil and gas lease; never gave any oil and gas leases; and they positively swear that at the time they bought this land and paid the consideration therefor, they did not know anything about the rules and regulations of the Secretary of the Interior. They testify positively that they did not know at that time, and for some months thereafter, that leases upon Indian lands, or lands of Creek Indians, or other Indian citizens, for oil and gas purposes, had to be filed with the Indian agent at Union Agency, Muskogee. They swear that they had no knowledge or information about any such rules, or any such custom or procedure. As said, they also positively swear that George Franklin Berryhill stated to them that he did not know the name of the party taking the old lease. In this status of the case, what could have been done in the way of making inquiry, and what would they naturally do, as reasonable, prudent and cautious men? That is the question, and the sole question. As said by the decisions, the cases must stand upon their own bottom. Each case is peculiar to itself. If Edmond and Perry McKay had have been oil operators in the Indian Territory, and had been familiar with the rules and regulations of the Secretary of the Interior, then there would be some force in complainant's argument that they, as prudent and cautious men, would naturally go to the Indian agent's office and make inquiry as to whether or not George Franklin Berryhill had made any lease on this land. Unfortunately for the complainant that is not the case. All the evidence introduced by complainant tending to show the notoriety of the rules and regulations of the Secretary among oil men and oil operators is incompetent and irrelevant, because Edmond and Perry McKay were not oil men; were not oil operators; had never taken any oil and gas leases, and had never given any. The question, then, for the court to determine is, what would a reasonably prudent man do in the same situation the McKays were in, under similar circumstances? The answer immediately occurs that a reasonably prudent man, under similar circumstances, would do just exactly what

they did do, and that was hold up a portion of the consideration—the major portion—and investigate the title in the same manner in which they investigated it. They investigated it by having an abstract of the title made by a reliable and competent abstractor. The general public goes to the office of the Register of Deeds for information as to the status of a title to land, and that is exactly what the McKays did in this case.

As said by Pomeroy in the section just quoted, rumors are not sufficient, and hearsay statements are not sufficient. There must be some positive information furnishing a *tangible clew*, by the aid of which he may commence and successfully prosecute an inquiry, and thus discover the real truth. What tangible clew was furnished to the McKays in this case by George Franklin Berryhill? Absolutely no tangible clew. What information did they derive from him, furnishing any tangible clew? They both positively swear that he told them he did not know the name of the man to whom he had executed the lease, and they are not contradicted in this by any one except George Franklin Berryhill, and he does not state positively that he told them it was McIlwane. Undoubtedly complainant has failed to establish any actual notice by bringing home to the McKays any knowledge of the complainant's lease. As said, complainant is simply seeking to surround the McKays with circumstances, from which the court is requested to infer actual notice, or charge them with knowledge and notice. As some authors say, constructive notice, as a matter of fact, is distinguished from constructive notice, as a matter of law. In discussing this question, Mr. Pomeroy, in Volume 2, Section 596, says:

> "It is actual and not constructive, because, although inferred from circumstances, it is inferred by mere process of argument, and not by means of any legal presumption. If the party thus put upon inquiry neglects to prosecute the inquiry, the conclusion of fact is then absolute, since the circumstances are left *unexplained* and the natural inference from them is left unanswered and unweakened."

In this case, however, the McKay's show that they did make an investigation and that they did make an inquiry. They made an

investigation and an inquiry from the only source shown by the evidence to have been open to them as prudent, cautious men. As far as they were concerned, on account of their ignorance of the rules and regulations of the Secretary, the office of the Indian agent at Muskogee might as well have been in the Hawaii Islands. They had no business with the Indian agent or the Secretary. They were in ignorance of the rules and were in ignorance of the fact that the Indian agent's office might reveal, as a matter of fact, whether or not any lease had been executed prior thereto. Constructive notice, as a matter of law, is not rebuttable, but notice by implication—that is, actual notice—is rebuttable. As said by some courts, constructive notice is rebuttable when the constructive notice is said to be fastened upon the purchaser by circumstances of fact, and not of presumption of law.

Pomeroy Equity Jurisprudence, Section 601.

In this section the author says:

"If a purchaser, having been put upon an inquiry, prosecutes it with reasonable and due diligence, without discovering any adverse right, the inference of an actual notice received by him is overcome and destroyed. What is a due inquiry in these instances of actual notice inferred from circumstantial evidence must, to a great extent, depend upon the particular facts of each case."

Wade on Notice, Section 65.
Rhodes v. *Outcalt*, 48 Mo. 367.
Wilson v. *Williams*, 25 Tex. 55.

Wade on Notice, Section 96, is as follows:

"The general spirit and object of the different American registry acts are substantially the same. They are intended to furnish the best and most easily accessible evidence of the titles to real estate, to the end that those desiring to purchase may be fully informed of instruments of prior date, affecting the subject of their contemplated purchases. And also that, having availed themselves of this means of knowledge, they may rest there, and purchase in absolute security, provided they do so without knowledge, information or such suggestions from other facts as would be gross negligence to ignore, of some antecedent conveyance or equitable claim."

In *Simpson* v. *Hinson,* 7th South. 265, decided by the Supreme Court of Alabama in 1890, the court said:

> "Much contrariety is found in the decisions as to what collateral facts are sufficient to put a party upon inquiry, so that he may be charged with notice of the main fact. The criterion most generally adopted and applied is whether the particular facts would lead a reasonably prudent man, acting honestly, to make further inquiries before consummating a transaction concerning the property. Though this test leaves a broad margin for the exercise of discretion and judgment, it is perhaps as definite as can be laid down, and applicable in the greater number of instances."

In this case Simpson mortgaged his crop to plaintiffs, but the mortgage was not recorded until after Simpson had executed a second mortgage to defendant. Defendant, before taking his mortgage, inquired of Simpson whether plaintiff did not hold a mortgage against him, but was informed that plaintiff did hold such mortgage, but that it was on other property, and did not include this crop. The court said:

> "The extraneous facts, sufficient to fix upon a party dealing in respect to the property notice of an unrecorded incumbrance, involve fraud or negligence in failing to make inquiries obvious to a prudent man."

The court further said:

> "But it is a harsh rule, tending to obstruct and defeat daily business transactions, which declares a party to be a *mala fide* purchaser, or charges him with notice of a prior unrecorded incumbrance, because of failing to make inquiry as to its contents, when the same person who informed him of its existence, also informed him at the same time that it does not affect the subject matter of his purchase, in the absence of any probable cause to suspect the truth of the latter statement. A rule of such stringency would go so far as to exact inquiry as to the contents of all unrecorded conveyances, which the party proposing to purchase was informed, or may have heard, had been previously made by the person with whom he is dealing as owner, because of a bare possibility that they may affect the particular property. No special rea-

sons are shown why the defendant should have doubted or suspected the truth of the statement of the mortgagor. Its apparent candor was rather calculated to induce confidence. There being no evidence tending to show any ground of distrust, the fact of which defendant was informed, was not, under the circumstances, sufficient to put him upon inquiry."

The Supreme Court of California, in the case of *Call* v. *Hastings*, 3 Cal. 179, held that:

"The doctrine of constructive notice has always been regarded as a harsh necessity; and the statutes which created it have always been subjected to the most rigid construction."

See also *Chamberlain* v. *Bell*, 7 Cal. 292; Warvelle on Abstracts, page 76.

The Supreme Court of Pennsylvania, in the case of *Pyles* v. *Brown*, 69 Am. St. Reports, 794, held that:

"Where an owner neglects to record his title, every presumption is in favor of a subsequent purchaser, and vague and indefinite recitals are not sufficient notice to put him on inquiry outside the record."

These decisions hold that the doctrine of implied actual notice is not favored, and the same has been held by this court.

In the case of *Wilson* v. *Wall*, 73 U. S. 83-91, this court cites, with approval, from Sudgeon on Vendors, as follows:

"In *Ware* v. *Lord Edgmont*, 4 De Gex, M. & G., 460, the Lord Chancellor Cranworth expressed his entire concurrence in what on many occasions of late years had fallen from judges of great eminence on the subject of constructive notice, namely: *that it was highly inexpedient for courts of equity to extend the doctrine.* When a person has not actual notice he ought not to be treated as if he had notice, unless the circumstances are such as enable the court to say, not only that he might have acquired it, but also that he ought to have acquired it but for his gross negligence in the conduct of the business in question. The question, then, when it is sought to affect a purchaser with constructive notice, is not whether

he had the means of obtaining and might by prudent caution have obtained, the knowledge in question, but whether not obtaining was an act of gross or culpable negligence."

In the case of *Williams* v. *Jackson* and *Jackson* v. *Stickney*, 107 U. S., 478-484, this court also said:

"To charge Williams with constructive notice of the fact that the notes had not been paid, in the absence of any proof of knowledge, fraud, or gross or willful negligence on his part would be inconsistent with the purpose of the registry laws, with the settled principles of equity, and with the convenient transaction of business."

In *Stanley* v. *Schwalby*, 162 U. S. 259-276, this court, among other things, says:

"But in order to charge a purchaser with notice of a prior unrecorded conveyance, he or his agent must either have knowledge of the conveyance, or, at least of such circumstance as would, by the exercise of ordinary diligence and judgment, *lead to that knowledge;* and vague rumors or suspicion is not a sufficient foundation upon which to charge a purchaser with knowledge of a title in a third person. Notice of a sale does not imply knowledge of an outstanding and unrecorded conveyance."

In these decisions by this court mentioning "constructive notice," they mean implied actual notice, or constructive notice, as a matter of fact, as distinguished from constructive notice as a matter of law. We therefore insist that no tangible clew was given to the McKays upon which they could base or found an inquiry or investigation further and other than the investigation made by them, to-wit, the examination of the records made by them of the records in the office of the United States Clerk as ex-officio recorder, which they did by having an abstract made by a reliable abstractor. The McKays took all caution any prudent man, under similar circumstances, would have taken. They held up the payment of $1,600 of the consideration until they investigated the title, and, after having made that investigation, they paid the said $1,600—the remaining part of the consideration.

They acted in entire good faith, and, under the circumstances, are free from negligence of any kind. George Franklin Berryhill did not tell them the name of any person from whom they could make inquiry, and we therefore insist that they were innocent purchasers and took the legal title to whatever interest George Franklin Berryhill had under their deed made on June 5, 1906.

If this be correct, then complainant's lease is of no effect against the McKays or their assigns, and the court need go no further.

Lease by the McKays to Arthur B. Reese.

If the McKays were not innocent purchasers, then we insist that Arthur B. Reese, under the lease made on October 12, 1906, by the McKays, was an innocent lessee, for valuable consideration, and therefore acquired rights superior to complainant. It is well settled that an innocent purchaser from a prior purchaser, who was not an innocent purchaser, will be protected in equity.

Stanley v. *Schwalby*, 162 U. S., 259-283.

The evidence in this case shows that Josiah G. Davis, cashier of the bank at Mounds, Indian Territory, was the agent of Arthur B. Reese, and had authority from Arthur B. Reese to represent him in the taking of a lease upon this land. Reese gave the matter none of his personal or individual attention, but depended upon said Davis entirely, as his agent in the matter. There was an agreement between Davis and Reese that the lease should be taken from the McKays in the name of Reese as lessee and a half interest assigned by Reese to Davis, or to Davis and such party as he might direct. In the negotiations between Davis, upon the one hand, and the McKays upon the other, the McKays represented to Davis that this land was free from any incumbrances of any kind or character; that they had obtained an abstract showing the title clear. Bear in mind that Reese gave the matter none of his personal attention, and had no individual dealings with the McKays, but acted entirely through Josiah G. Davis, who was acting both for himself and for Reese. Although the McKays represented to Davis that the land

was clear of any leases or incumbrances of any kind or character, Davis took the precaution to telephone H. H. Adams, a reliable and reputable abstractor, at Sapulpa, directing said Adams to investigate at the Indian agent's office, with a view to ascertaining whether or not any prior departmental lease had been made upon this land in question. Davis testified that he had Adams make similar investigations upon many previous occasions, and had found him accurate, correct and reliable, and trustworthy. Davis received a telephone message from Adams stating that he had investigated the matter at the agency and found no lease upon this land.

On October 13, 1906, Davis received a letter from Adams, which is on file in this case, in which Adams stated that there was no departmental lease against the land, as shown by the records. Whether Adams ever made any investigation or not is entirely immaterial. The question is, did Davis exercise proper care—such care and caution as a reasonably prudent man would exercise under similar circumstances? Davis had had some experience in the oil business and knew that leases taken from heirs of allottees, subject to the approval of the Secretary had to be filed in the office of the Indian agent, under the rules and regulations of the Secretary, as a condition precedent to any action thereon by the Secretary. With this knowledge, Davis, in the exercise of proper care and caution, did make an investigation. The lease was written on October 12th, the day it bears date, but the consideration of $800.00, in addition to the royalty stated in the lease, was not paid by Davis until several days thereafter—that is, until after he had had an investigation made and ascertained the results of said investigation. In the meantime, Davis had agreed with G. B. Harmon that he, Harmon, should have a three-eighths undivided interest in this lease. Harmon made no investigation of the records himself, depending entirely upon Josiah G. Davis. Harmon states that he asked Davis whether or not he had made any investigation, and Davis showed him this letter from Adams, in which Adams stated that he had investigated and found no lease in the Indian agent's office. Thereupon Harmon paid his $300.00 to Davis—the con-

sideration for his three-eighths undivided interest. Davis, in the meantime, paid to the McKays the $800.00, $400.00 of which sum was the money of Arthur B. Reese, and $400.00 of which sum was his own money, or the money of himself and G. B. Harmon. This is not entirely clear. At any rate, no money was paid by either Davis to the McKays, or by Harmon to Davis, until after the letter had been received by Davis from H. H. Adams, the abstractor. As said, in my view of the case, it is immaterial whether or not Adams did make such investigation. He represented to Davis that he had. Adams is shown by the evidence of not only Davis, but also of other witnesses, to have been a reliable and trustworthy abstractor. Davis testified that he had formerly had Adams do a great deal of business of this kind for him, and found him accurate and correct. Was Josiah G. Davis guilty of any negligence in this transaction? Did he pursue the proper inquiry? Did he make that investigation an ordinarily prudent man, under similar circumstances, would have made? Unquestionably we think the court will have to find with us on that proposition under the evidence in this case. Reese and Harmon were certainly not guilty of negligence in depending on Josiah G. Davis to investigate the status of the title. Davis was an attorney and the cashier of the Bank of Mounds. Harmon unquestionably was guilty of no negligence, because he not only acted upon the statement of Davis, but also directly upon the statement contained in Adams' letter. As a matter of fact, Adams did communicate with the office of the Indian Agent at Muskogee, and inquire whether or not this land in controversy was covered by any lease, and was informed that there was no lease upon the land. This conversation over the telephone between Adams and some one in the Indian Agent's office is competent, although Adams failed to recognize the voice of Mr. Ford, the chief in charge of the lease division, or any other official.

Godair v. *Han. Natl. Bank*, 116 Am. St. Rep., 172.
Knickerbocker Ice Co. v. *Gardiner Dairy Co.*, 69 Atl. Rep., 405.

Adams testified that he described the land over the telephone to some one at the other end of the line in the office of the Indian

Agent, but did not give them the name of the allottee or lessor. Complainant introduced some of the employees at the agency to show that they would not give out the information when the inquirer only gave them the description of the land—that it was necessary to know the name of the lessor or lessee, or number of the lease. These witnesses, however, positively swear that they would not give out any statement under circumstances of that kind, and if they did say there was a lease or no lease, the inquirer must have told them the name of the lessor or allottee, or number of the lease. Adams testifies positively that some employee in the office of the Indian Agent told him there was no lease, and it must follow that he gave them other information than a mere description of the land, in order to get any answer of any kind. But, as said, we deem it immaterial whether he made any investigation or not, under the circumstances.

Therefore, we insist that the transaction between Davis, upon the one hand, and the McKays upon the other, has every element of an honest business transaction—has every element of proper inquiry, and has every element of proper investigation, and, therefore, it must follow, as a matter of fact, and as a matter of equity, that the lease taken from the McKays of the date of October 12, 1906, operated to vest the leasehold interest in Arthur B. Reese, for the use of himself, George B. Harmon and Josiah G. Davis, as innocent *bona fide* lessees, for a valuable consideration, and without notice of any equities or claims by the complainant.

The assignment of the lease by mesne conveyances through various parties down to the Kiefer Oil and Gas Company, vested said Kiefer Oil and Gas Company with the same right and title acquired by Reese and his two associates, Davis and Harmon, and it is immaterial to inquire whether or not the Kiefer Oil and Gas Company is an innocent purchaser. We might enter at great length into the question of innocent purchaser on each assignment, but we feel so confident of sustaining our position on both of these conveyances, the first, to the McKays, by George Franklin Berryhill, and the second, the lease from the McKays to Reese, that we will not extend this already too lengthy brief and argument.

Fourth Proposition.

Assuming for argument's sake that the court sustains complainant's contention down to this proposition, and decides against defendants on all of the points heretofore made, another very material question arises which seems to us fatal to complainant's case. The complainant is forced to insist that upon the approval of his lease by the secretary on April 19, 1907, the lease took effect by relation, as of date of March 24, 1906,—the date the lease was executed by George Franklin Berryhill and wife. Complainant cannot possibly win this case upon any proposition without the court holding with him on this point. At the time the lease was executed and delivered to complainant, and up to the approval thereof by the secretary, the complainant unquestionably had no leasehold estate in the land in controversy, and it is therefore absolutely necessary to the complainant to sustain his lease upon the doctrine of relation. In answer to complainant's proposition in regard to the doctrine of relation, we put forward two contentions, which we will designate by letter.

Contention "A."

Defendants contend that no contract existed between George Franklin Berryhill and the complainant on June 5, 1906, the date upon which George Franklin Berryhill conveyed whatever interest he had in the land to Edmond and Perry McKay. We admit that the courts have held, and, as we think, correctly, that a deed executed by an Indian laboring under restrictions, when subsequently approved by the Secretary or the President, by a fiction of law, took effect as of the date the deed was executed and delivered to the vendee. Where the deed is executed by the Indian and delivered to the vendee and the purchase money either paid or agreed to be paid, the parties have accomplished everything they can do in order to pass the title. They have done everything any two individuals would do not laboring under restrictions against alienation.

X, an American citizen, conveys by deed to Y, a tract of land in consideration of one thousand dollars, either paid in money or by notes or mortgages or other security. If no security is given, then the law fastens a vendor's equity upon the land as security for the purchase price. The vendor has done all that he could do—he has executed and delivered the deed as per the terms of the agree-

ment. The vendee has done all he has agreed to do at the time—that is, accept the deed. An Indian, laboring under restrictions against alienation, which is a personal disability and not a defect in the title, executes and delivers a deed to the purchaser, which is accepted by the purchaser, yet it is ineffectual and invalid unless approved by the President or Secretary—whichever the law designates, yet the parties have done all they are to do between each other. The contract is an *executed contract* insofar as the parties are concerned. This is a highly important point to remember—that is, that upon the execution and delivery of the deed the contract becomes an executed contract. Therefore, the subsequent approval of the deed by the Secretary or the President, as correctly held by this court passes the title, by relation, as of the date of the deed.

Lomax v. *Pickering,* 145 U. S., 310-316.

The situation, however, presented in this case is vastly different in many aspects. The lessee, upon the execution and delivery of the lease by the lessor, had a good many things to do before the lease became binding upon the lessor. Under the express terms of the lease itself the lessee was required to do something before the lease could have any binding effect, validity or force. We propose to show, under the terms of this lease, and under the rules and regulations of the Secretary, the doctrine of relation cannot be invoked in the first place, and in the second place, if it can be invoked, there is no contract between the parties which prevented the lessor from revoking and receding from the same at any time before the lessee complied with the rules and regulations of the Secretary.

The lease provides as follows:

> "It is further agreed and understood that this lease shall be of no force or effect unless the party of the second part shall, within sixty days from the date and approval of the *application* filed in connection herewith, furnish a satisfactory bond in accordance with the regulations of July 10, 1903, prescribed by the Secretary of the Interior, which shall be deposited and remain on file in the Indian Office during the life of said lease." (Record p. 23).

The lessee does not agree anywhere in this lease to file this bond; he is not bound by any term or obligation to file the bond; no rule of the Secretary requires him to file the bond, except as a condition precedent. The lessor could not, by suit for specific performance, compel the lessee to file this bond. The lessee does not covenant to file the bond, and the doctrine of breach of covenant does not apply. The filing of the bond is, therefore, made by the lease itself, as well as by the rules of the Secretary, a condition precedent, and not a condition subsequent. It needs no citation of authority to show the court that a contract must be mutual in its obligations and mutual in its terms and effect. Lack of mutuality is fatal to all contracts. "Mutuality of engagement is necessary, and, if the condition or contingency produces want of mutuality, the consideration is insufficient. Both parties must be bound or neither is bound."

Marble Co. v. *Ripley*, 10th Wall. 339.
Javierre v. *Central Altagracia*, 217 U. S. 502.
Taussig v. *Corbin*, 142 Fed. Rep. 660.
Shubert v. *Woodward*, 167 Fed. Rep. 47.
Fowler Utilities Co. v. *Gray*, 79 N. E. Rep. 897.
Pom. Eq. Jr., Vol. 4, Sec. 1405.
Clark on Contracts, page 165.
Karrick v. *Hannaman*, 168 U. S., 328.

The rules and regulations of the Secretary of the Interior refer to any lease—that is, the rules of July 10, 1903, applicable to the bond, and are as follows:

> "All original lessees of mineral lands shall be required to furnish a bond, with two or more sufficient sureties, or a responsible surety, guaranteeing the payments of all royalties and rents at the time and in the manner specified in the lease, and the performance of all covenants and agreements named in the lease to be paid and performed by the lessee. Such bond shall be in the amounts as follows: (naming the amounts): *But the right is specifically reserved to increase the amount of such bond above the sums named, in any particular case where the Secretary of the Interior deems it proper to do so.*"

This is the exact requirement in the rules and regulations prescribed by the Secretary and copied into the bill of complaint filed in this case.

We, therefore, contend that the most that can be made out of said lease up until the lessee files the bond required by the lease, or mentioned by the lease, and the rules and regulations of the Secretary of the Interior, is a mere revokable offer upon the part of the lessee, which he may withdraw at any time before the lease is approved and the bond filed as aforesaid.

In *Express Co.* v. *Western N. C. R. R. Co.*, 99 U. S., 191-2, this court declined to decree specific performance because the plaintiff had reserved under the terms of the contract the right to revoke it. This court said:

> "A court of equity never interferes where the power of revocation exists."

A long line of state and federal decisions have followed this case.

This question is so thoroughly reviewed in *Shubert* v. *Woodward*, 167 Fed. Rep. 47-62, that the citation of further authority is really unnecessary. Judge Sanborn says:

> "But it is both unreasonable and unjust for a court of equity to constrain one party to an agreement to specifically perform it when it is without power to compel the other party to do so and he may escape its performance at will, and the general practice as well as the weight of authority sustains the rule."

In *Federal Oil Company* v. *Western Oil Company*, 121 Fed. Rep. 674-678, the United States Circuit Court of Appeals, Seventh Circuit, among other things, says:

> "There was here an entire want of mutuality—and utter absence of obligation on the part of the appellant. Equity will not specifically enforce a contract against one party when it cannot be specifically enforced against the other."

See the opinion of the circuit court in the same case, reported in 112 Fed. Rep. 373.

This court in the celebrated case of *Marble Co.* v. *Ripley*, 10 Wall. 339, among other things, said:

> "Another reason why specific performance should not be decreed in this case is found in the want of mutuality; such performance by Ripley could not be decreed or enforced at the suit of the Marble Company, for the contract expressly stipulates that he may relinquish the business and abandon the contract at any time on giving one year's notice, and it is a general principle that when, from personal incapacity, the nature of the contract, or any other cause, a contract is incapable of being enforced against one party, that party is equally incapable of enforcing specifically against the other, though its execution in the latter way, might, in itself, be free from the difficulty attending its execution in the former."

See also:

Fowler Utilities Co. v. *Gray*, 79 N. E. Rep. 897.
Taussig v. *Corbin*, 142 Fed. Rep. 660.
Maryland Tel. & Tel. Co. v. *Simons' Sons Co.*, 63 Atl. Rep. 315.
Frank v. *Stratford-Hancock*, 77 Pac. Rep. 135.
Pomeroy's Jurisprudence, Vol. 4, Sec. 1405.
Pomeroy on Contracts, Secs. 162-163.
Waterman on Specific Performance of Contracts, Sec. 193.
Iron Age Pub. Co. v. *W. U. Tel. Co.*, 83 Ala. Rep. 498; 3 Am. St. Rep. 763.
Meason v. *Kaine*, 63 Pa. St. Rep. 335.
Brooklyn Base Ball Club v. *McGuire*, 116 Fed. Rep. 782.
General Electric Co. v. *Westinghouse Electric & Mfg. Co.*, 144 Fed. Rep. 458.
Lattin v. *Hazard*, 27 Pac. Rep. 515.
Louisville, etc. Ry. Co. v. *Bodenschatz-Bedford Stone Co.*, 39 N. E. Rep. 703.
Tombigbee Valley R. Co. v. *Fairfield Lumber Co.*, 47 So. Rep. 92.
Pacific Electric Ry. Co. v. *Campbell-Johnson*, 94 Pac. Rep. 623.
Strang v. *Richmond P. & C. R. Co.*, 101 Fed. Rep. 511.
LaHogue Drainage Dist. No. 1 v. *Watts*, 179 Fed. Rep. 691.
Natford Oil & Gas Co. v. *Shipman*, 84 N. E. 53 (Ill.)
Kolachny v. *Galbreath*, 110 Pac. 902 (Okla.)

Complainant's response to this is that he paid George Franklin Berryhill a consideration of one hundred dollars, which was sufficient consideration to prevent George Franklin Berryhill from revoking the offer before the Secretary acted upon the lease. Complainant's counsel, we presume, will invoke that line of cases sustaining option contracts. The weight of modern authority undoubtedly holds that option contracts, where they are sustained by a consideration, are binding, but, unfortunately for complainant, this is not an option.

Clark on Contracts, page 46, gives in black letter type, the following rules:

> "First. Until the moment of acceptance, an offer may be revoked, and a subsequent acceptance will be inoperative, except that an offer under seal cannot be revoked at common law.
>
> Second. Notice of revocation must be communicated, to prevent an acceptance from being effective.
>
> Third. The moment of communication of a revocation, unlike the moment of communication of acceptance, is the moment of its receipt, and not the moment of its dispatch.
>
> Fourth. An unaccepted offer, though coupled with a promise to keep it open for acceptance for a certain time, may nevertheless be revoked before the time has expired, if the promise is without a consideration."

Further, Clark, page 50, says:

> "A revocation need not be communicated, but it is sufficient if he has knowledge of acts clearly indicating an intention to revoke. In case of an offer to sell specific property, actual knowledge of its sale to another would clearly show intent to revoke."

Subsequent sale or transfer of the property to a third person has the effect at once of terminating an offer.

Coleman v. *Applegarth*, 68 Md., 21; 6 Am. St. Rep., 417.

Complainant did not file the bond required by the lease and the rules of the Secretary until the 4th day of April, 1907, over a

year from the date of the lease, and many months after George Franklin Berryhill had sold and conveyed the land by deed. (See agreed statement of facts, Section 9. Record, p. 202). The twenty-ninth section of the agreed statement of facts shows that George Franklin Berryhill on the second day of February, 1907, filed in the office of the Indian Agent a protest against the approval of this lease, in which protest he stated that he had sold the land and conveyed it by deed, and requested that the lease be not approved, stating, as one of the reasons, that complainant had not complied with the rules and regulations of the Secretary and the terms of the lease.

This same section of the agreed statement of facts shows that complainant was notified before March 20, 1907, of the filing of this protest, and that he had notice and knowledge of the sale of this land. We, therefore, insist that the record clearly shows the following:

First. That George Franklin Berryhill recalled and revoked the offer on June 5, 1906, by selling the land to the McKays.

Second. That the complainant had notice of this sale and revocation several months before he filed the bond.

Complainant had not accepted the lease—that is, the offer, at the time the land was sold, and did not accept it by filing the bond before he received notice of the revocation. Therefore, his subsequent acceptance by filing the bond was of no effect. It is absolutely clear that complainant was not bound by the terms of this lease, and although it had been delivered to him, he had not accepted it, and, under the terms of the lease, his acceptance could only be signified in one way. The only way his acceptance could be signified was by the filing of the bond. It is a well-known proposition of law that delivery of a deed or lease is not sufficient; acceptance must follow the delivery. Without acceptance the delivery is of no effect. That is true with a deed or any conveyance of land or any interest in the land.

This lease expressly provided for the manner of acceptance, and no other acceptance could be good except that acceptance speci-

fied in the lease. It is entirely clear that complainant was not bound by the lease or any of its terms until he filed the bond, which was a *condition precedent* to the lease having any force or effect. No fiction of law or equity by relation could carry that lease to any date later than the date upon which he filed the bond, to-wit, April 4, 1907; and we contend that an acceptance on that date was of no effect because the offer had been withdrawn by George Franklin Berryhill on June 5, 1906, and notice of the revocation of the offer given to Shulthis long before he undertook to accept the lease by filing the bond.

There can be absolutely no contract in law without the consent of both parties.

In *Beers* v. *Mackin*, 145 U. S., 561, this court had under consideration an alleged contract analogous to the points under discussion. In that case the land was patented to the Union Pacific Railroad Company as a part of its land grant. The plaintiff took a contract to purchase stipulating for possession and for warranty deed upon the payment of the *balance of the purchase money*. On the 21st day of March, 1883, a date anterior to the contract with plaintiff, J. H. McConnell, the local agent of the railroad company, executed to defendant a writing, of which the following is a copy:

> "To be given to the purchaser. No. 3085. Land Department, U. P. R. R. Co. Nebraska, North Platte, March 21, 1883. Received of Bernard Beer, of North Platte, Neb., six hundred and eighty dollars and sixty cents ($680.60), on account of first one-fifth payment on the north half, etc., containing 1,361 20-100 acres, at $2.50 per acre. Subject to the approval of the land commissioners at the office of the company, at Omaha, Nebraska.
>
> Sold on five years' time. J. H. McConnell."

The contract was immediately forwarded to the land commissioner of the railroad at Omaha, with a part of the consideration transmitted, to-wit, $392.00 in county warrants. The warrants were returned and the money substituted therefor by defendant.

The land commissioner, after a delay of three months, refused to approve the contract, and defendant insisted that the delay was equivalent to an *acceptance* of the contract, which, in effect, was a mere offer. It was insisted by the plaintiff that this instrument and transaction between the agent and the defendant was a mere proposition or offer on the part of the defendant to purchase, and in nowise binding upon the railroad company until accepted by it. The Supreme Court said:

> "This instrument on its face shows that the agent did not assume authority to make a sale. He did not pretend to make a binding contract on the part of the railroad company. The face of the paper itself shows that it was subject to the approval of the land commissioner, so that if the agent had represented that he had full authority the defendant was notified by the terms of the paper given to him that he had not, and that the whole matter was to be referred to and subject to the approval of the land commissioner. In other words, it stands simply as a proposition; no more and no less. It binds the company no more than if defendant had written to it offering to buy the land and enclosing a certain sum as part payment, and the railway company, through its proper officer, had acknowledged the receipt of the money and notified him that the proposition would be considered and subsequently acted upon. Under such circumstances would the failure to act upon the proposition within a reasonable time create a contract?"

In answer to that the Supreme Court of the United States said:

> "A contract is said to imply the consent of two minds. There never has been an assent on the part of the railway company, and whatever comment may be made or criticism placed upon the delay of the railway company, can it be said that it is bound by a contract to which it has never assented? When a proposition of purchase of real estate is sent by mail, must the owner decline the proposition immediately under penalty of being adjudged to have accepted it? On the contrary, is not the rule universal that the proposition must be in terms accepted before a valid contract is made? If the

defendant was unwilling to wait till the railway company had fully considered his proposition, he could have demanded a return of his money; if he said nothing, it must be assumed that he was willing that it should take the time that it did to determine whether it would accept or reject his proposition. As it does not appear that any officer or agent of the railway company ever made, or pretended to make, a valid contract with the defendant, it must be held that he acquired nothing by simply accompanying his proposition to purchase by a deposit of part of the purchase price."

The plaintiff who had in the meantime purchased the land from the railroad company was declared to be the owner of the property.

The question in this case is similar to the rule governing contracts made by agents which provide that they shall not be binding until approved by the principal.

Page on Contracts thus lays down the rule:

"If A makes an agreement with B's agent, in the form of a contract, but subject to B's approval, this is in legal effect an offer by A to B and may be revoked at any time before B accepts. So a contract signed by an agent, which is not to go into effect until approved by his principal, in writing, has no effect until approved."

1 Page on Contracts, Section 53.

The approval of the lease in question by the Secretary of the Interior would not lend life and validity to the instrument unless the bond was filed as required by the terms of the lease. No such condition of affairs is presented in those cases discussing approval of deeds by the Secretary or the President, because the deeds contain no condition.

Mr. Page, in his excellent work on contracts, says:

"In considering first the types of so-called contracts, in which mutuality of obligation is lacking, it is evident that if an offer has not been accepted there is no contract, and hence no remedy will be given, either in law or equity. So, if certain terms are left open for future negotiation the contract

is not complete, and no relief, least of all specific performance, can be given. Classes of cases presenting these as the controlling facts, are often classed as illustrations of lack of mutuality. If a gratuitous option has been given by defendant to plaintiff, and such option has not been turned into a binding contract by acceptance, specific performance thereof cannot be enforced. Thus a promise to convey realty by the terms of which the vendee has the option to accept and pay for the property, or to refuse it and relieve himself from all liability, does not impose any liability on the vendee, and hence none on the vendor. So, a promise to buy corporate stock, which the vendor is not obliged to sell unless he wishes, is not binding on the vendor, and hence not on the vendee. So a contract of sale, by which the vendee is to pay for the property in fifteen days or give up his rights under the contract and permit the property to be resold, is not binding on the vendee, and hence not upon the vendor. So an agreement to subscribe to corporate stock if a railroad should be incorporated, which imposes no obligation to incorporate, lacks mutuality. In such cases the party who is not bound in terms cannot compel specific performance against the adversary party, if the latter has repudiated the contract before definite acceptance by the former."

3 Page on Contracts, Section 1616.

It is insisted, however, by complainant's counsel, that the $100.00 paid as a bonus was a consideration entitling Shulthis to the lease, regardless of any acceptance by filing the bond.

As heretofore said, option contracts are sustained by the weight of modern authority. An offer cannot be withdrawn during the time stipulated for in the contract if the agreement by the offerer or proposer be to keep the offer open for a time is supported by a consideration. The consideration for the option is entirely separate and distinct from the consideration for the deed or contract which is the ultimate object of the purchase. This distinction is well maintained by the authorities.

Page on Contracts, in the same section above quoted (1616), says:

"If, however, such option is given for a valuable consideration, it cannot be withdrawn during the time stipulated for, and on acceptance within the time limited, specific performance may be decreed in a proper case. If the option is given for a valuable consideration it is held that if accepted within the time limited specific performance may be given, even if before acceptance the vendor has attempted to withdraw the offer by sale to a third person who has notice of the vendee's interests."

The $100.00 was not paid in this case for any option or right to elect or accept the lease. The $100 was not paid by the complainant as a consideration for an agreement upon the part of George Franklin Berryhill to hold open for a definite or indefinite time, or for a reasonable time, his offer to make the lease. *The $100 was paid as a part of the consideration for the lease itself,* and was not paid as a consideration for any option or any right to elect whether he would accept the lease or not. This distinction is absolutely fatal to complainant's proposition.

In discussing option contracts, the Supreme Court of Appeals, of West Virginia, in a very able decision rendered on November 22, 1904, said:

"The peculiarity of contracts of this class, which makes them anomalous and sometimes difficult to construe, is the want of mutuality of remedy. The *distinction,* however, *between want of mutuality of remedy and lack of mutuality in the contract must not be overlooked. The privilege of purchase is bought and paid for. The contract of purchase of the privilege, the option, not the contract of purchase of the land,* is fully performed by the optionee. It is executed on his side, and needs no remedy for its enforcement. It is executory and unperformed on the other side, and may be enforced. Here, again, it is to be observed, in cases of this kind, the court does not, strictly speaking, enforce the option. What it really enforces performance of is a contract of sale that grows out of the option, and to which the plaintiff has been able to bind the defendant by reason of the option. The defendant has made an offer which he cannot withdraw. The plaintiff accepts it by

tender of the money. This makes a complete contract of sale, enforceable in equity. The defendant needs no remedy against the plaintiff, because the offer is so drawn that the latter must perform or tender performance of every duty to be performed by him in the premises, *before any contract of sale is effected.*"

Rease v. *Kittle,* 49 S. E. Rep., 150.
Watts v. *Kellar,* 56 Fed. Rep., 1.

Thus it will be seen that in effect there are two contracts—first, a contract supported by a consideration, whereby one party agrees to hold an offer open for acceptance by the other party for a certain length of time. The optionee upon paying the consideration for the privilege has performed all of that part of the contract, or all of the contract of option. It is executed upon his side—that is, the contract of option. It is executory upon the part of the optioner. Upon the optionee accepting the offer, the second contract is closed—that is, the second contract becomes good, because it is mutual. That is not this case by any means. This question has also been ably discussed by the Supreme Court of Wyoming, in a decision rendered on June 27, 1904. The court held: "Where a contract is intended to bind both parties, or is of such a nature that it contains mutual executory provisions, if for any reason one of the parties is not bound, he cannot compel performance by the other." The court then discusses the law applicable to options, and draws the same distinction between the consideration for the option and the consideration for the sale of the land held by the Supreme Court of Appeals of West Virginia. This distinction is important. This decision of the Supreme Court of Wyoming is also important, for the further reason that the contract sought to be enforced was a provision in a lease providing for the sale of the land leased to the lessee. The term in the lease there under discussion was as follows: "It is further agreed that the party of the second part, the lessee, shall deposit with the party of the first part the sum of $500 for the faithful performance of this lease, and the payment of the taxes as aforesaid." The court held that the rental in the lease was sufficient consideration or an option of purchase contained in the lease,

provided, however, the lease was binding between the parties. The $500 deposit was not made by the lessee, and the court held the lease never became effective between the parties, and therefore specific performance was denied. The court said:

> "Now in the case at bar, the optional agreement does not recite a consideration; but it is contained in a written contract signed by the parties, and it is maintained on the part of defendants in error that the contract, being a lease of the premises, constituted a sufficient consideration for the agreement to convey, and it seems to be relied on as the sole consideration. On the other hand, it is contended that the contract never took effect or became operative as a lease, or for any other purpose, for the reason that the plaintiff neglected to perform a condition precedent to its operation, viz., the agreement to deposit $500 as security for her faithful performance of the lease and the payment of the taxes. Hence, it is insisted that the paper did not amount to a lease, and could not, therefore, be regarded as a proper consideration for the optional agreement, and that the lessor, Frank, revoked the agreement by the sale and conveyance of the premises to his co-defendant, Mrs. McKenzie, which fact was brought to the knowledge of the plaintiff shortly thereafter, and before any acceptance on her part of the privilege of purchase. It becomes important, therefore, to consider the character of the agreement to make the deposit, and whether the failure to do so rendered the lease ineffective. There is no dispute upon the facts as to the deposit. It was neither made nor offered at any time; but, on the contrary, the plaintiff stated, after her eviction, and when her attention was called to her neglect to comply with her agreement to secure her performance of the terms of the lease by making a deposit of $500, that she repudiated that part of the contract."

The court then said, which is a vital point in this case:

> "Conditions precedent are to be strictly complied with. Such a condition is one that must happen or be performed before the estate dependent upon it can arise or be enlarged, while a condition subsequent defeats the estate in case it does not happen or is not performed. In determining whether a particular provision amounts to a condition or not, the rule

is that the intention of the grantor governs. Such intention is to be gathered from the whole instrument and the existing facts. The authorities lay down the principle that whether a condition is precedent or subsequent depends upon the intent of the parties, as collected from the whole contract, whatever the order in which they are found, or the manner in which they are expressed, although certain words are customary when a condition rather than a covenant is intended."

The court further said:

"The deposit was required for a specified purpose, viz., to secure the faithful performance by plaintiff, the lessee, of the lease, and the payment of the taxes. She had agreed to keep the fences and buildings in repair, to refrain from pasturing stock upon certain designated lands, and to limit her use of the premises in other respects; and the only rental was to be the taxes for the year, and a certain portion of the crops."

In discussing the difference between a condition precedent and a covenant, the court hits this case right in the eye when it says:

"As a covenant it would have added nothing substantially to the contract. The damages that might be recovered upon its breach could not have exceeded the damages sustained by a breach of the covenants which it was intended to secure; and those damages would be as capable of recovery by assigning and proving a breach of the principal covenants. The very nature of the provision would seem to stamp it as a condition precedent. There would be little necessity for requiring security by a deposit of money after the time for performance of the lease had expired, and the lessee had enjoyed on her part all its benefits."

Frank v. *Stratford-Handcock*, 77 Pac., 135; 67 L. R. A., 571.

The rules and regulations of the Secretary expressly state what the bond was to be made for—the bond was to secure the faithful performance of the terms of the lease, "guaranteeing the payment of all royalties and rents at the time and in the manner

specified in the lease, and the performance of all covenants and agreements named in the lease to be paid and performed by the lessee."

The term in the lease made to complainant refers to the rules and regulations for the purpose of the bond, and the filing of the bond was unquestionably a condition precedent. The approval of the lease without such bond would have been a nullity, because it would have violated the express terms of the lease itself.

The lease having expressly called for a bond the Secretary had no authority or power to waive or eliminate that term in the lease unless the lessor consented. In *Midland Oil Company* v. *Turner,* 179 Fed. 74-76, the United States Circuit Court of Appeals for the Eighth Circuit had under consideration the power of the Secretary to change or modify the terms in the lease. The court said:

> "The power of the Secretary with respect to oil and gas leases of Cherokee allottees was that of approval or disapproval. He could veto but could not initiate or make a lease. He might refuse to approve because of the presence of a provision, and thereby render the lease ineffective; but he could not strike out a part and have the remainder continue in force without the concurrence of the lessor."

This seems so plain, however, that a citation of authority is unnecessary. Not only did the Secretary have no power to change the terms or provisions of the lease, but he had no power except where the authority was given him by the lease itself to change his rules and regulations existing at the time the lease was made so as to diminish or increase the rights, liabilities, or burdens of either the lessor or lessee.

In *James* v. *Germania Iron Co.,* 107 Fed. Rep. 597, the United States Circuit Court of Appeals for the Eighth Circuit held that the rules of practice for the land determined formally, established and promulgated by authority of the Secretary of the Interior can be repealed or abrogated by like formal action and publication only, and that their repeal or abrogation cannot affect pending cases. See also collection of authorities in 32 Cyc., 1006.

There was no way to force the lessee to file this bond. Complainant's counsel cannot contend that the filing of the bond was a mere covenant, the breach of which would not affect the contract. The filing of the bond was not a condition subsequent, but a *condition precedent,* according to the express terms of the lease. The approval of a deed by the Secretary or the President would have been the final act. The doctrine of relation might apply and would apply to a deed. But the doctrine of relation cannot apply over a condition precedent. The approval of the lease by the Secretary, without this bond, would have been a nullity unless the lessor had so agreed. The $100 was not paid for any option or any right of election or any privilege. Complainant's bill negatives that contention. In the bill he says: "That on or about the said 24th day of March, 1906, the said George Franklin Berryhill and Clementine Berryhill, for a valuable consideration, acknowledged and delivered unto your orator their certain indenture of lease in quadruplicate, wherein and whereby they did demise, grant and let unto your orator, his executors, administrators and assigns, for the term of fifteen years from the date thereof, all of the oil deposits," etc. The only consideration mentioned in the lease is the royalty.

In complainant's testimony he is asked this question:

Q. State what, if any, consideration, other than the covenants and agreements, and the royalties reserved in the said lease, was paid to the lessors in said lease for the execution and delivery of the same? A. $100 (Record, page 94).

The $100 was not paid by complainant in person, but by his agent, McIlwane. McIlwane is asked in the original examination:

Q. Do you know what consideration was paid to George Franklin Berryhill and Clementine Berryhill *for this lease?* A. Yes, sir.

Q. What was it? A. $100.

Q. Who paid that $100? A. I did (Record, page 140).

John Cheney, a witness for complainant, who was present with McIlwane at the time this lease was taken, was asked:

Q. Do you know what the consideration for that lease was? A. $100.

Q. Do you know whether George Franklin Berryhill and Clementine Berryhill got the $100? A. Yes, sir; I went with Frank to get the cash.

On cross examination he is asked:

Q. That $100 you paid him was the bonus? A. Yes, sir.

The $100 was therefore not paid as a consideration for any right of election upon the part of Shulthis, or any privilege, but was a part of the consideration for the oil and gas privileges. The case bears none of the elements of an option. George Franklin Berryhill had the right to revoke said lease at any time before it was accepted by Shulthis, the complainant. And the lease provided the method of acceptance.

Filing the bond would operate as an acceptance and bind both parties.

In discussing this question, the Court of Appeals of Kentucky in 1905 said:

> "Until the offer to purchase was accepted, there was no contract between the parties, it being the rule that contracts must have mutuality to be binding."

There was no consideration for the agreement that the offer should not be revoked.

If A proposes to B to sell him property at a given price, and states that B is to have a given time within which to accept the proposition, it is called an option, and, in effect, contains the agreement that for a given time the offer is irrevocable; but, unless there is a consideration for the *option*, it is revocable, nevertheless, by the offerer at any time before the acceptance of the offeree.

Becker & Co. v. *Alvey*, 86 S. W., 974.

In *Litz* v. *Goosling*, 19 S. W. 527, the Court of Appeals of Kentucky further said:

> "Reciprocity of obligation is, however, essential to the validity of a contract; and it is a general rule that, in order

to be binding upon or enforceable by one party, it must be so as to both. This is the very essence of it. The act to be done upon the one hand need not necessarily be simultaneous with the consideration paid or to be paid upon the other, but it is elementary that mutuality of obligation is, in general, necessary to uphold a contract. If one agrees, at the option of another, to convey to him land at a certain price, and the consideration is unexecuted, such an agreement is not enforceable, because it rests altogether with one party whether it shall be carried out. There is no mutuality of obligation in it. A mere naked option to one party, where no advantage or disadvantage, necessary as a consideration to support a contract, moves between the parties, is not enforceable. It is a *nudum pactum*, because there is not a legal obligation upon each side to perform."

In *Becker & Co.* v. *Alvey, supra,* the court said:

"The proposition of appellee was to buy a soda fountain from appellant at a given price, with the express stipulation that this offer would not be withdrawn until appellant had exercised its option of acceptance. Appellant was not bound by this contract until after it chose to accept it, and until it was bound appellee was not bound. There was no consideration for the *additional and independent contract* that the offer was to remain open until after appellant exercised its option of acceptance. This being true, it follows, that, until the notification to appellee by appellant that it had accepted his offer, there was no contract between them, and appellee had the right to withdraw his proposition to purchase."

Where was the independent contract in this case at bar between George Franklin Berryhill and Albert W. Shulthis, by the terms of which independent contract, independent of the lease, Berryhill, for a consideration, agreed to allow Shulthis any special time in which to accept the lease? If there had been such an independent contract, supported by an independent consideration, then Mr. Shulthis, the complainant, could insist that George Franklin Berryhill did not have the right to withdraw the lease and revoke the offer before the expiration of a reasonable time from the date of the lease. No such contract has been proven in

this case, or attempted to be proven. Shulthis paid nothing for any privilege or election. He paid $100 as a partial consideration for the mineral rights in this land. But the $100 was not paid for any option. To illustrate the exact proposition: A and B enter into negotiations for the sale of a tract of land by A to B; the price is fixed at $1,000; B pays A $100, but does not agree to pay the other $900; the $100 paid is a part of the $1,000, the price fixed by A on his land, and the price at which he *offers it for sale.* B does not bind himself to accept the land and pay the $900 remainder of the consideration. The $100 is not paid by B as a consideration for a collateral and independent agreement, by the terms of which A is to keep open the offer to sell to B the land for $1,000 for any specified time, or any reasonable time. There was nothing further than an offer upon the part of A to sell to B, which offer stands open for B's acceptance at any time before A withdraws it. A unquestionably had a right to revoke the offer and he could revoke by selling the land to a third person, with or without notice. B was not bound, because he had not agreed to buy the land and pay the $1,000 consideration, and therefore A was not bound to sell to B. Had A and B, however, entered into negotiations, whereby A proposed to take $1,000 for his tract of land, and B paid him $100, not as a part of the consideration for the land, but as a consideration for the independent and collateral contract and promise upon the part of A to hold open that offer for a certain number of days, or a reasonable time, then the situation would be different. The option contract, that is, the independent and collateral contract, could be executed by B immediately upon his payment of the $100, the consideration for the right to elect, or the privilege of accepting the offer. A would be bound by the option contract, because it was supported by a consideration. B had already executed the option contract; that was closed insofar as he was concerned, because he had paid the consideration for the option—that is, the right of election. If B did not accept the proposition, his $100 could not be recovered, because it was paid as a consideration for keeping the offer open. However, B could recover the $100 in the first illustration from A, because it was

not a consideration to keep the offer open, and he could recover under a *quasi* contract for money had and received.

The Court of Appeals of Illinois, in *Standard Manufacturing Company* v. *Lembke*, in 1903, had under consideration a written contract for the purchase of goods. The contract stated that the order was not subject to countermand or recall, but the contract provided that the seller should furnish a bond. Appellant, the seller, was to furnish a bond and leave it with Brown and Brown, and the bond was to secure the performance of the contract. The court held that the contract was not, therefore, complete until the bond was furnished, which was not done until several days later. The court said:

> "The contract was not therefore complete until the bond was furnished. Had appellant failed to give this bond, there would have been no contract, and until the contract was complete, appellee had the right to rescind the same."
>
> *Standard Manufacturing Co.* v. *Lembke*, 108 Ill. Appeal, 530.
>
> *Northwestern Thresher Co.* v. *Lesueur*, 88 Pac. 541.

The minds of the parties must have met on one and the same thing. How could the minds of the parties be said to have met on one and the same thing when the rules of the Secretary of the Interior in regard to this bond expressly empowered the Secretary to introduce an unknown and uncertain term into the lease, under the provisions of the rules, as follows:

> "But the right is specifically reserved to increase the amount of such bond above the sums named in any particular case, when the Secretary of the Interior deems it proper to do so?"

The Secretary of the Interior, therefore, necessarily became a party, in a certain sense, or, at least, in a qualified sense, to this lease. Neither the lessee nor the lessor could know what kind of bond would be required by the Secretary in this particular case. So far as they knew at the time the lease was executed and delivered the Secretary might require a bond in a larger amount than

the amount specified in the rules. *The amount of the bond, therefore, not being fixed, a material term of the lease or contract was not agreed upon. The minds of the parties did not meet upon any particular amount in the bond, because it was left open for the Secretary to increase the amount specified in the rules. Therefore, the minds of the parties did not meet on a material term in the negotiations.*

We insist that no contract existed between the parties, and no contract could possibly exist until the Secretary had acted—fixed the amount of the bond, approved the bond and approved the lease. The Secretary was expressly made, by the terms of the lease, the guardian of the lessor. Instead of the Secretary being the agent of the lessor, the lessor was in effect and in law, the mere agent of the Secretary. The Secretary was the main party and assumed control over the terms of the lease and reserved the right to modify them before he would approve the same. This is not a case where the parties—an Indian, for instance—was making a deed subject to the approval of the Secretary or the President which the courts have held would be completed after the execution and delivery of the deed. The Secretary made rules and regulations which were referred to in express terms in the lease, and the Secretary was given authority and power in this lease to change the amount of the bond before the approval of the lease. Then, how is it possible to conceive of a contract existing between the parties before the Secretary had acted? *In effect and in law there are three parties to this lease, all of whom must concur.* The Secretary of the Interior, the lessor, and the lessee constitute the three persons, and the minds of the three parties must meet upon one and the same thing before any contract can exist between the lessor and the lessee. The lease expressly provides that it is made "under and in pursuance of the provisions of Section 17 of the Act of Congress approved June 30, 1902, and the regulations prescribed by the Secretary of the Interior therein." If the rules and regulations prescribed at the time the lease was made had been final, and not subject to alteration, in as far as the terms of the lease were concerned, and this particular lease is concerned, the situation might have some different aspects.

The lease further provides: "And it is mutually understood and agreed that no sub-lease, assignment or transfer of this lease, or of any interest herein, can be directly or indirectly made without the written consent thereto of the lessors *and the Secretary of the Interior first obtained*, and that any such assignment or transfer made or attempted without such consent shall be void." Not only was the lease made unassignable, without the consent of the Secretary, but here is another stipulation worthy of note, to-wit: "If the lessee makes reasonable and *bona fide* effort to find and produce oil in paying quantities, as is herein required of him, and such effort is unsuccessful, he may at any time thereafter, *with the approval of the Secretary of the Interior,* surrender this lease upon the whole payment and performance of all of its then existing obligations hereunder." The Secretary did not propose to quit when he approved the instrument, but by the terms of the lease itself he was made a necessary party and under his rules and regulations there was no contract existing between the lessor and the lessee until such lease was approved by the Secretary.

The most important provision in the said lease is as follows:

> "And the party of the second part agrees that this indenture of lease shall in all respects be subject to the rules and regulations heretofore, or that may hereafter be, lawfully prescribed by the Secretary of the Interior relative to oil and gas leases in the Creek Nation."

Under this provision, the Secretary had authority to prescribe entirely different regulations and rules before acting upon the application for the approval of this lease, and the rules and regulations being introduced into the lease as a part of the terms thereof, as express conditions, introduced uncertain and unknown quantities, and uncertain and unknown terms, which the lessor and lessee could not possibly have agreed upon, and therefore it must follow as a natural conclusion that the minds of the parties never met, and that, therefore, no contract existed between them till the Secretary, the third party, acted.

We therefore insist that until the bond was filed, as required by the express terms of the lease, the instrument of writing was nothing farther than an offer, and was subject to revocation by George Franklin Berryhill at any time before complainant filed the bond, which was necessary to constitute an acceptance of the offer by complainant.

Contention "B."

If the court should disagree with us upon the above contention, then we shall insist that the sale of the land by George Franklin Berryhill on June 5, 1906, passed all of the right, title and estate in him to Edmond and Perry McKay, free from the claims of complainant under the lease, for the reason that the doctrine of relation could not carry the lease back to its date of March 24, 1906, after it had been approved by the Secretary of the Interior.

As heretofore said, it must be insisted by complainant's counsel, and if they fail to sustain the contention, complainant must lose, that the lease, when approved by the Secretary, took effect by the doctrine of relation as of the date of the lease—that is March 24, 1906—and therefore cut off all intervening conveyances.

It will therefore be necessary to examine the doctrine of relation. This doctrine is fully discussed by this court in *Hussman* v. *Durham*, 165 U. S., 143-150.

In short, the facts in that case are about as follows: On May 19, 1858, Robert Craig located bounty land warrant No. 27,911, issued to William Long under the Act of Congress of March 3, 1855, upon the land in controversy, and obtained from the proper land officer a certificate of location. The certificate was recorded in the office of the recorder of the county in which the land was situated. No patent was issued thereon. On February 1, 1864, the Secretary of the Interior cancelled the land warrant under the authority of Act of Congress of June 23, 1860. This act provided that whenever it should appear that any land warrant was lost or destroyed, whether the same had been sold or assigned by the warrantee or not, the Secretary of the Interior should cause a new warrant to be is-

sued, which new warrant should have all of the force and effect of the original, and upon such action the original warrant should be deemed and held to be null and void, and any assignment thereof fraudulent; and further, that no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith, and for a valuable consideration. The second section authorized the Secretary to prescribe rules and regulations to carry into effect the act. It was alleged in the petition filed in this case that the assignment on the warrant purporting to be that of Long, the warrantee, was a forgery, and this allegation was admitted by the defendant. The action of the Secretary was taken, so far as it appears, without any notice of Robert Craig. Nothing was done, either in the local land office or the Land Department at Washington, to formally cancel the certificate of location. Up to the year 1886 the records of the Land Department showed on their face a full equitable title passing to Robert Craig by virtue of his certificate of location and payment therefor in a land warrant. Bear in mind that this was the first warrant issued. During these years the land was subjected to taxation by the officers of Carroll County, Iowa, and was sold for non-payment of taxes; and the title under such tax sales passed to Bernhard Hussman, the defendant below.

In 1866, Durham, plaintiff below, having obtained conveyances from Craig, applied to the Land Department for leave to purchase the land upon payment of the regular price. This application was granted under authority of rule 41 of the Department of the Interior. The money, $150, was paid by Durham in 1888, and a patent issued of date October 3, 1889, to Robert Craig, his heirs and assigns. Durham then commenced suit to recover the land against the purchaser under the tax sale. The District Court of Iowa entered a decree in favor of Durham, the plaintiff. The court said:

> "On the merits of the case we remark that while it is undoubtedly true that when the full equitable title has passed from the government, even prior to the issue of a patent con-

veying the legal title, the land is subject to state taxation, yet, until such equitable title has passed, and while the land is still subject to the control of the government, it is beyond the reach of the state's power to tax. Therefore the validity of the tax titles held by plaintiff in error depends upon the question whether the equitable title to the land had passed from the government to Craig."

The owner of the tax title insisted that the equitable title passed to Craig upon the location of the land warrant, and that the subsequent issuance of the patent, by relation took effect as of the date of May 19, 1858, vitalized his title under the tax sale, and left nothing for Craig's assignee to take under the sale by Craig subsequent thereto. In discussing the doctrine of relation the court said:

"Neither can it be said that on the issue of a patent the title by relation always dates of the time when the certificate of location was issued. A title by relation extends no further backwards than to the inception of the equitable right. If no equitable right passed by the surrender of the land warrant and the certificate of location in 1858, but only by the payment of the money in 1888, the legal title created by the issue of the patent has no relation back of this later day (1888). In other words, the United States does not part with its rights until it has actually received payment, and if by mistake, inadvertence or fraud a certificate of location is issued when in fact no consideration has been received, no equitable title is passed thereby; and a conveyance of the legal title does not operate by relation back of the time when the actual consideration is paid. These views have been recognized in Iowa, as elsewhere."

Quoting from the Supreme Court of Iowa, with approval, this court said:

"In order to protect a title, or attain the ends of justice, the courts will, under the doctrine of relation, which is a fiction of law, hold that a title began at the date of an entry or location upon the public lands. But this doctrine cannot be invoked to burden the holder of a title, and require him, in violation of justice, to pay taxes when he held neither the equity nor title to the lands."

This court in this case further said, in quoting from *Gibson* v. *Chouteau*, 80 U. S., 13 Wallace, 92:

> "The error of the learned court consisted in overlooking the fact that the doctrine of relation is a fiction of law adopted by the courts solely for the purpose of justice, and is only applied for the security and protection of persons who stand in some privity with the party that initiated proceedings for the land and acquired the equitable claim or right to the title. The defendants in this case were strangers to that party and to his equitable claim, or equitable title, as it is termed, not connecting themselves with it by any valid transfer from the original or any subsequent holder."

This court in several cases has held that the doctrine of relation is an equitable doctrine, and refers back to the time only when the equitable title passed.

We shall insist in this case that the lease, under its express terms, precludes it from taking effect when approved by the Secretary by relation as of date of March 24, 1906. In the first place, as heretofore argued, under Contention "A," it is expressly agreed that the lease shall be of "no force or effect unless the party of the second part (lessee) shall, within sixty days of the date of the approval of the application, file in connection herewith, a satisfactory bond," etc.

The lease could not take effect by relation to a later date than April 4, 1907, the date upon which this bond was filed. But this is by no means the only reason. The lease contained this provision:

> "And the party of the second part further agrees and binds himself, his successors and assigns, to pay or cause to be paid to the lessor, as advance royalty on this lease, the sums of money as follows, to-wit:
>
> 15 cents per acre per annum in advance for the first and second years;
>
> 30 cents per acre per annum in advance for the third and fourth years;
>
> 75 cents per acre per annum in advance for the fifth and each succeeding year thereafter of the term for which this lease is to run, it being understood and agreed that said sums

of money so paid shall be a credit on the stipulated royalties should the same exceed such sums paid as advance royalty. And, further, that should the party of the second part neglect or refuse to pay such advance annual royalty for the period of 60 days after the same becomes due and payable, then this lease shall, at the option of the lessors, be null and void, and all royalties paid in advance shall become the money and property of the lessors."

The agreed statement of facts, under Section 8 (Record, page 203), is as follows:

> "On the 13th day of May, 1907, complainant paid into the hands of the United States Indian Agent, Dana H. Kelsey, the advance royalty provided for in said lease."

This stipulation in the lease is for "15 cents per acre per annum *in advance for the first and second years;* 30 cents per acre per annum *in advance* for the third and fourth years," etc. Now, what is the first year? If the first year is to begin on March 24, 1906, the date of the lease, at which time, by the doctrine of relation, complainant seeks to have the lease go into effect, then this advance annual royalty should have been paid within sixty days after March 24, 1906. If the lease is to be considered as beginning on that date, by any doctrine of relation, then it must surely follow that this advance royalty was due within sixty days after March 24, 1906, under the express terms of this lease. It is expressly provided in the lease, "that should the party of the second part neglect or refuse to pay such advance annual royalty for the period of sixty days after the same becomes due and payable, then this lease shall, at the option of the lessors, be null and void, and all royalties paid in advance shall become the money and property of the lessors."

The lessee considered the lease as taking effect from the date of the approval by the Secretary, inasmuch as he did not pay the advance royalty until after the lease was approved by the Secretary.

The advance royalty was either due sixty days after March 24, 1906, or sixty days after April 19, 1907, the date the lease was approved, or sixty days after April 4, 1907, the date the lessee filed the bond.

If the doctrine of relation is to be invoked to put the lease in force and effect on March 24, 1906, then the same doctrine must require the advance royalty to have been paid within sixty days from that date.

The lessors exercised their option to annul the lease by conveying the land, by warranty deed, and notifying the lessees of such conveyance, and notifying the Secretary that the land had been sold, and requesting the Secretary not to approve the lease.

On this point we are willing for the court to let the lease take effect on either date, but if it must take effect on March 24, 1906, then the lease was forfeited, because the advance royalty was not paid within sixty days after that date, and the option to forfeit was exercised by George Franklin Berryhill when he sold the land and notified the lessee of such sale and protested to the Secretary of the Interior against the approval of the lease on the ground that the lessor had not complied with the rules and regulations.

We are willing for the lease to take effect on the date the Secretary approved it. If it took effect on the date the Secretary approved it, then it had no force and effect, because the land had been sold and the title passed from the lessor. The option to annul and avoid the lease for non-payment of advance royalty was exercised by selling the land or by protesting against its approval, such protest having been communicated to Shulthis.

22 Cyc., 555-556.
Wright v. *Raftree*, 54 N. E., 998.
Ban Cloyster v. *Slogan*, 36 N. E. 946.
Metropolitan Sand Co. v. *Maury*, 71 S. W., 696.
Also see Thornton Oil and Gas, Sec. 158.

Fifth Proposition.

If the recording laws were not applicable then the intervening rights and equities of the McKays under their deed of June 5, 1906, for the cash consideration then paid, without actual notice of the complainant's lease, were paramount to any rights and equities then existing in the complainant.

It is contended by complainant that in the absence of any recording statute priority in time is priority in right. This is only true where the equities are equal. Pomeroy's Equity Jurisprudence, third edition, Volume 2, Section 682, says:

> "Among successive equitable estates or interest, where there exists no special claim, advantage or superiority in any one over the others, the order of time controls. Under these circumstances the maxim, among equal equities, the first in order of time prevails, furnishes the rule or decision. Between a legal and equitable title to the same subject matter, the legal title in general prevails, in pursuance of the maxim, where there is equal equity the law must prevail."

The same authority in Section 727 says:

> "The settled doctrine is, that if a second or other subsequent holder, who would otherwise be postponed to the earlier ones, obtains the legal estate, or acquires the best right to call for the legal estate, he thereby secures an advantage which entitles him to priority."

At the time the McKays purchased the land from George Franklin Berryhill, complainant's lessor, the complainant certainly had nothing further than an equity, or rather an inchoate estate which could not arise to the dignity of a legal title until approved by the Secretary of the Interior. The McKays obtained the equitable and the legal title for a valuable consideration without notice. The equities of the McKays are certainly equal to the equities of the complainant in as much as the McKays paid a valuable consideration without notice of the complainant's claim. The McKays in addition obtained a perfect title. They got the legal and equitable title. There was nothing to be done to perfect their rights. We, therefore, invoke the well settled principle announced by Mr. Pomeroy that "where there is equal equity, the law must prevail."

The doctrine of relation is purely an equitable doctrine, and for the purpose of administering justice. *The doctrine of relation, however, has never been applied to give a prior equal equity preference over a subsequent equal equity, where the subsequent equal*

equity had been merged into the legal title prior to the time the doctrine of relation could be invoked.

We have diligently searched and been unable to find any decision carrying the doctrine of relation that far.

After the restrictions were removed by the Act of April 26, 1906, the Secretary's jurisdiction was exhausted in so far as he might by approval affect the rights of intervening purchasers for a valuable consideration and in good faith. Suppose the Secretary should approve a subsequent lease and thereafterwards undertake to approve a prior lease. The first approval by the Secretary would amount to an exhaustion of his jurisdiction, and his subsequent approval of the first lease would be of no effect. Suppose the Secretary should approve a deed made by an Indian after such Indian had executed a lease, and the Secretary approves the subsequent deed before he approves the prior lease. It would certainly be held that the vendee under the subsequent deed, where he purchased without notice, would be protected under his approved deed against the prior lease subsequently approved by the Secretary. This doctrine is supported by the decision of this court in *Lomax* v. *Pickering*, 173 U. S. 27; 43 L. Ed. 601. In the Lomax case the President approved both deeds, but he approved the deed prior in time first, and then afterwards approved the second deed. This court said:

> "By his approval of the first deed the title of Robinson was wholly divested and there was nothing left upon which a subsequent approval could operate, unless we are to assume that such subsequent approval in some way revested the title in Robinson and passed it to McClure."

This same Lomax case was before this court in 145 U. S. 310; 36 L. Ed. 717. This court, speaking through Mr. Justice Brown, said:

> "If, after executing this deed, Robinson had given another to another person, with the permission of the President, a wholly different question would have arisen. But, so far as Robinson and his grantees are concerned, the approval of the President related back to the execution of the deed and validated it from that time. As was said by this court in *Cook* v.

Tullis, 85 U. S. Wall. 332, 338 (21 : 933, 936) : "The ratification operates upon the act ratified precisely as though authority to do the act had been previously given, except where the rights of third parties have intervened between the act and the ratification. The retroactive efficacy of the ratification is subject to this qualification. *The intervening rights of third persons cannot be defeated by the ratification.*' See also *Fleckner* v. *Bank of United States,* 21 U. S. 8 Wheat. 338, 363 (5: 631, 637). In *Ashley* v. *Eberts,* 22 Ind. 55, a similar act of the President approving a deed was held to relate back and give it validity from the time of its execution, so as to protect the grantee against a claim by adverse possession which arose in the interim between its date and the confirmation. 'Otherwise,' said the court, 'a mere trespasser by taking possession after a valid sale and before its consummation, would have power to defeat a *bona fide* purchaser.' This case was approved in *Steeple* v. *Downing,* 60 Ind. 478, 497. In *Murray* v. *Wooden,* 17 Wend. 531, a conveyance of land by an Indian which, subsequent to its date, had been ratified by a certificate of approbation of the surveyor-general in the form prescribed by law, was held to be inoperative upon the ground that, *previous to the granting of such certificate, the Indian had conveyed to a third person, and the deed to such person had been approved in the mode prescribed by law previous to the endorsement of the certificate of the approbation of the deed first executed.*"

While the Secretary did not approve the deed to the McKays, his approval was not required and the McKays obtained a complete title by their deed which is certainly as good as if approved by the Secretary.

Resume.

In conclusion, we, therefore, insist

I.

That George Franklin Berryhill, complainant's lessor, had nothing further than a mere life estate; that under the Arkansas Statutes the allotment set apart in the name of Andrew J. Berryhill was in contemplation of law a new acquisition and not ancestral;

and that therefore the father took nothing greater than a life estate.

II.

That a life tenant could not lease the land for oil and gas mining purposes, it appearing from the record that there was no open mines on the land at the time George Franklin Berryhill inherited the same.

III.

That the recording laws put in force in the Indian Territory applied to complainant's lease.

IV.

That the defendants, Edmond and Perry McKay, at the time they purchased the estate of George Franklin Berryhill on June 5, 1906, had no notice, either actual or constructive, of the complainant's claims, and were therefore *bona fide* purchasers.

V.

That Arthur B. Reese was a *bona fide* lessee of said land from Edmond and Perry McKay.

VI.

That the land was made alienable by Section 22 of the Act of Congress of April 26, 1906, and that George Franklin Berryhill, the intervenor, has no rights in this case.

VII.

That the equities are with the defendants; that the defendants in good faith went on the land and operated it for oil and gas and expended large sums of money on the faith of the title of the McKays.

Wherefore, appellees insist that the decree of the United States Circuit Court for the Eastern District of Oklahoma, as affirmed by the Circuit Court of Appeals, is correct, and should be affirmed by this court.

Respectfully submitted,

GEORGE S. RAMSEY,
Of Counsel for Appellees.

Preston C. West, Counsel.

APPENDIX.

Paper read by Judge M. E. Rosser before the Oklahoma City Bar Association on February 14, 1910, on the subject, "A New Acquisition as Applied to Inherited Lands of the Five Civilized Tribes."

Judge Rosser is now a Commissioner of the Supreme Court of Oklahoma. The paper read by Judge Rosser is as follows:

The descent or devolution of property has always been, and probably will always be one of the chief concerns of a civilized government, and it would seem that the wisdom and experience of the ages would have devised a system before this that would render certain all questions affecting the title to lands by descent. But, notwithstanding the fact that the legislators of the world have been working on the subject since the beginning of individual ownership of land, questions continue to arise.

Mr. Jefferson wrote the Virginia Statutes of descent and distribution and in making the law upon that subject he changed entirely the old English system of having regard to the blood of the first purchaser and wrote a system founded on the affections of the heart (*Davis* v. *Rowe*, 6 Rand. 355). This system was intended to follow the natural flow of the affections and to require the property to descend in the same manner that natural affections would have disposed of it had the owner attempted to make disposition. The system which he prepared was about the same as the Arkansas Statutes of descents and distributions and very little litigation ever arose with reference to its construction. But shortly after his code was adopted a statute was passed, which provided in substance that where a child died without issue, having title to real estate derived by gift, devise or descent from one of his parents, the whole should pass to his kindred on the side of his parent from whom it was derived, if any such kindred were living at the time of his death. Dr. John B. Minor, commenting upon this statute in his Institutes, says:

> "This provision mars the symmetry of the original law of descent and comes not out of Mr. Jefferson's 'Quiver of choice arrows.' It arose out of a solicitude to prevent estates going out of the families where they originally belonged and it is the only instance where any respect is paid by the statute to the blood of the *first purchaser,* * * * and has given occasion to most of the litigation connected with our law of descents."

The same desire to prevent estates going out of families where they originally belonged actuated the early legislators of the State of Arkansas, and, after passing a general statute upon the subject, largely taken from the New York Code, but resembling the Virginia statute, the statute further provided that,

> "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a *new acquisition* it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act, and in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

This statute was carried into Mansfield's Digest of the Statutes of Arkansas and was extended over and put in force in the Indian Territory by act of Congress. There is a great diversity of opinion as to when it took effect in the Choctaw and Chickasaw Nations so far as it concerns children who were living when their allotments were selected, but that is another story. From the time it did take effect, until statehood, children of the various Indian Tribes were dying without descendants and the question as to whether or not their allotments were *new acquisitions* affects a large amount of land on the eastern side of the state and is a very important one to the lawyers of the Indian Territory side.

It was the opinion of most of the bar of Indian Territory that the estate of an allottee was a new acquisition within the meaning of the statute and the lawyers who studied the land ques-

tions of that part of the state were, with a few exceptions, very much surprised when the Circuit Court of Appeals of the Eighth Circuit, in the case of *Shulthis* v. *McDougal,* 170 Fed. 529, decided that the allotment of a member of the Creek Tribe of Indians was not a *new acquisition,* but that it came by the father. No lawyer who has studied the opinions of the Circuit Court of Appeals of the Eighth Circuit will deny that it is a court of great ability and no self-respecting lawyer will attempt a criticism of the opinion of that or any other court except in the most respectful manner, but I believe that, if done with the proper respect which every member of the bar owes to every respectable court, any lawyer has the right in a bar association to differ from any court and to point out to his brethren the reason for differing.

In the course of the opinion where this decision was made Judge Amidon, who delivered the opinion of the court said:

> "Among the people of Arkansas there was no way of acquiring land except by grant, gift or inheritance. This was true even of lands acquired from the Federal Government under the public land laws. The patentee of such lands was always required to purchase the same either by residence and improvement, or the payment of a purchase price, or by these elements combined. It needs but a moment's thought to see that when this statute was applied to the lands of the Creek Nation it was applied to a subject matter entirely different from that which was in the mind of the legislature of Arkansas. The lands of that tribe fit into neither of the classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. The tribal lands belonged to the tribe. The legal title stood in the tribe as a political society; but those lands were not held by the tribe as the public lands of the United States are held by the Nation. They constituted the home or seat of the tribe. Every member, by virtue of his membership in the tribe, was entitled to dwell upon and share in the tribal property."

The opinion then argues at some length the question of the status of the allottee toward his land and then says:

"So long as the tribal relations continued, a member had no right to have a share of the tribal property set off to him as his private, separate estate, for the constitutional policy of the tribe was ownership in common. But when, as here, the time came to disband the tribe, its ownership as a political society could no longer continue and the division of its property was far more akin to the partition of property among tenants in common than the grant of an estate by a sovereign owner. Under such a scheme it cannot be said that the property which passed to an allottee is a new right or acquisition created by the allotment. The right to the allotment antedates the allotment and is simply given effect to by that act. Viewing the tribal property and its divisions in this light. Andrew J. Berryhill acquired his right to the land in question by his membership in the tribe. It was his birthright. It came to him by the blood of his tribal parent and not by purchase. In applying the Arkansas Statute we shall accomplish the purpose of Congress and the Creek Nation best by treating the lands, not as a *new acquisition*, but as inheritance from his parents as members of the tribe. His father was the only parent through whom he derived his right and to the father the land should pass. If the mother had been a member of the tribe, then the land should properly pass to the parents equally."

In the case of *Eastern Cherokees* v. *United States and Cherokee Nation*, 117 U. S. 312, 29 Law Ed. 880, the Eastern Band of Cherokees sued for a proportionate part of the funds belonging to the Cherokee Nation, derived from the sale of certain lands, part of which were west of the Mississippi River. The Supreme Court denied the right to recover and among other things said:

"Their claim, however, rests upon no solid foundation. The lands, from the sale of which the proceeds were derived, belonged to the Cherokee Nation as a political body, and not to its individual members. They were held, it is true, for the common benefit of all the Cherokees, but that does not mean that each member had such an interest as a tenant in common that he could claim a *pro rata* proportion of the proceeds of sale made of any part of them. He had a right to

use parcels of the lands thus held by the Nation, subject to such rules as its governing authority might prescribe; but that right neither prevented nor qualified the legal power of that authority to cede the lands and the title of the Nation to the United States."

If the Nation as a political body could grant the lands of the tribe, the title of the individual members must have been very slender indeed. A tenant in common cannot have his right divested by a deed to which he is not a party.

In *Stephens* v. *Cherokee Nation* and kindred cases, reported in 174 U. S. 445, Law Ed. 1041, the question of the constitutionality of the citizenship court was at issue. It was claimed by persons who had been admitted to citizenship in the various tribes by the United States Court in the Indian Territory that they had thereby obtained vested rights in the lands and moneys of the tribes, of which they could not be divested by a judgment of the citizenship court. In refuting this claim Mr. Chief Justice Fuller says:

> "But in any aspect, we are of the opinion that the constitutionality of these acts in respect of the determination of the citizenship cannot be successfully assailed on the ground of the impairment or destruction of vested rights. The lands and moneys of these tribes are public lands and public moneys and the assertion by any particular applicant that his right therein is so vested as to preclude inquiry into his status involves a contradiction in terms."

In the case of Journeycake, cited by Judge Amidon in the Shulthis case, Mr. Justice Brewer, speaking of the interest of certain Delaware Indians in the lands of the Cherokees said (155 U. S. 215, 39 Law Ed. 125):

> "That interest being like that of the native Cherokees, limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and the right to share in any future allotment."

A fee simple title to land is very different to that of a mere right of occupancy. A title which permits a man to hold his land in severalty and to sell and dispose of it is very different from a right of occupancy, especially when he cannot sell his interest in the land nor alienate it in any way, nor even transfer his right of occupancy except to one of the same tribe.

The case of *J. E. Fleming et al.* v. *Green McCurtain et al.*, is the celebrated or notorious suit brought by Webster Ballinger on behalf of several thousand persons claiming to be Choctaws and Chickasaws by blood for their share of the tribal properties, asking to have a trust declared therein in their favor. Mr. Justice Holmes delivered the opinion of the court on the 8th of November A. D. 1909, and after stating the contention of the plaintiffs that the patent of 1842, founded on the treaty of 1830, of the lands described therein, provided that the Choctaw Nation was to have and to hold the same, "to them and their descendents, to inure to them while they shall exist as a Nation and live on it," liable to no transfer or alienation except to the United States, or with their consent, created the Choctaw Nation a trustee for them as descendants of the members of the tribe at the time of the grant, and that as beneficiaries of the trust thus created they could recover, says:

> "As we cannot agree with this construction, it will be unnecessary to consider many of the further allegations of the bill. The foundation of the plaintiffs' case is upon the words of the treaty and the patent that we have set forth. Those words seem to us to convey a different meaning on their face,—a meaning that would not be changed, but rather confirmed, if we were to refer at length to the earlier and later dealings with the tribes, which we shall not need to do."

The court then proceeds to show that the conveyance was to the Nation, as such, and not to individuals.

But the plainest declaration of the status of the individual Indians toward the lands of the tribes is contained in the opinion of the Circuit Court of Appeals of the Eighth Circuit, by one of

the judges who took part in the Shulthis case, in the case of *Ligon* v. *Johnston*, 164 Fed. 670. In that case Judge Hook said with reference to the lands of the Choctaw and Chickasaw Tribes:

> "That the lands involved were public lands, belonging to the Choctaw and Chickasaw Nations and not to the individual members, has been assumed without contradiction from the inception of their titles through a long sequence of acts of Congress and treaties and agreements with the tribes. True, as contended, the title so held has frequently been referred to as being held in trust for the members of the tribes, but it is only so in the broad comprehensive sense in which the public property of any government is in trust for the welfare of its people. Until specific, private, individual rights attach pursuant to law the enforcement of such trusts must be at the bar of public conscience. They are not justifiable."

As has just been shown by the Fleming case the title was not held in trust in any legal sense of the term.

It would appear, therefore, that the title to the lands of these tribes was in the various tribes as such in their political capacity, prior to the dates fixed by the various treaties at which, or as of which, the rolls should be made up.

In the case of *Hogan* v. *Finley*, 52 Ark. 55, it was decided that where a father, desiring to procure the title to certain lands belonging to the State and to give them to his son, procured a donation deed from the State to his minor son and paid the fees and expenses necessary to obtaining the deed, the title so obtained, was a *new acquisition* in the son, that the father took only a life estate in the lands and that he had no interest in the lands he could devise.

To the same effect is the case of *Magness* v. *Arnold*, 31 Ark. 103. These cases as well as the case of Kelly's Heirs in 15 Ark. 555, had been the settled construction of the statute in Arkansas for years before the statute was adopted in the Indian Territory, and, in putting the statute in force in the Indian Territory, Congress undoubtedly intended to extend with it the construction that had been placed on it by the Supreme Court of Arkansas.

"Estate" signifies the condition or relation a man bears to his

property, or his interest therein. It seems very clear that a mere right of occupancy, with a bare right to transfer to a member of the same tribe, is not the same estate as a fee simple title with full right of alienation, and the fact that by restrictions the right of alienation is postponed does not change the matter. It would seem that the new title made by the treaty, selection as an allotment and patent, made an entirely new estate in the land and that it was a *new acquisition* in the person who first received it. It is true, as stated by Judge Amidon, that the decedent received the land by virtue of his blood, but that is a condition of his getting the land and does not signify that he got the title from his father. It was merely evidence of his membership in the tribe and as a matter of fact many persons shared in the tribal lands who were not of Indian blood at all, but derived their rights by intermarriage or by adoption.

Judge Amidon does not claim that the father granted the land to the child, but expressly says that in Arkansas there was no way of acquiring land except by grant, gift or inheritance, and then says that the lands of the Indians fit into neither of these classes. There are ways by which title to land can be obtained otherwise than by gift, grant or inheritance—for instance, by prescription or escheat—but no way can be imagined by which a title can pass from father to son except in one of these three ways. The child in this case did not receive it as a gift from the father because the father never had it. He did not receive it by grant for the same reason and he did not get it by inheritance for the same reason and for the further reason that the father was not dead. To say that a man has inherited something implies that some one is dead. No man is heir to the living and in this case the father was living. The Shulthis case says that the land came by inheritance from the father, but to speak of the matter in this language unsettles all the use of terms as settled by the common law. It will be something new in the law of real property if a child can inherit from the father and the father back from the child and still there be only one funeral in the family.

If the Indians were tenants in common of the tribal lands prior to allotment, then, where a wife died before her allotment was selected and it was selected in her name after her death, other conditions being satisfied, the husband would have taken curtesy under the Arkansas law, and so as to dower in the allotment of the husband. All the courts that have passed on these questions have held that no curtesy or dower existed and their decision is based on the fact that there was no tenancy in common prior to allotment and that the title created by the allotment was an entirely new estate.

No court of appeal has decided these questions to my knowledge, but Judge Wm. H. H. Clayton of the Central District of Indian Territory, who is exceedingly well informed upon all Indian questions, decided the matter prior to Statehood and I understand that Judge Clark of Oklahoma County, has decided the same question in the same way since Statehood. Unless the estate acquired by allotment is a *new acquisition* these decisions are wrong.

I will state that no matter is better settled under the decisions of Arkansas than the tenancy in common gives the right of curtesy.

It would seem that the Indians prior to allotment stood in about the same relation to the tribal lands that a citizen of the United States does to the public lands of the United States. To be sure they had the right of occupancy, but the United States could give such a right in the public lands to its citizens without conveying any title. The fact that a member of the tribe had occupied the lands gave no right in the lands except a preference in selecting their allotment on the portion upon which they had improvements, and that preference was given by the treaty and was created by it.

The father never owned the lands which were allotted to the child, and if the child had not been born neither the father nor any other member of the tribe could have owned its allotment. The part selected for the child would have become a part of the surplus unallotted lands of the tribe and at some glad day probably would have been sold and the proceeds, at some more indefinitely postponed time, paid *pro rata* to the members of the tribe. Neither

the father nor other near relative of the tribe would have gotten a cent more of the proceeds than a member who was in no way related to the child. The child did not inherit the lands from any person, nor did any person give or grant them to the child. Then it must be a *new acquisition.*

The treaties fixed a day when all members of the tribe then living should be entitled to share in the division of the lands, moneys and other property. The lands were divided between them just as the shareholders of a corporation might agree to dissolve the corporation and divide the property among the shareholders. Each shareholder would hold by a new and different title from that which had formerly existed in the corporation.

The individual allottee claimed title through no other person, but through the political society to which he formerly belonged; just as much a new one as is created by patent from the United States, conveying some of the public lands to one of its citizens.

With a few notable exceptions, as stated before, the profession was very much surprised at the decision. Of course the gentlemen who have been buying these Indian titles and taking a lease, for five years (which they recorded), a power of attorney irrevocable for twenty years, a quit claim deed (which they had recorded), and a warranty deed, looked very pleasant, said it was what they had always said and went over to the recorder's office and filed their warranty deed for record. But none of them had expected it to the extent of paying anything like full value for the land. They had taken all these instruments under the belief that they were getting only a life estate.

What the final result of the matter will be remains to be seen. A gentleman of considerable prominence has said that a question is never settled until it is settled right. If the Shulthis decision is not right, will the matter get before the Supreme Court of the United States at an early day? Will our State Supreme Court follow it? I will say in passing that I doubt seriously if that appeal will be decided by the Supreme Court. I am inclined to think that it will be dismissed on account of the manner in which the suit was brought. How long will it take the decision to become a rule of property? It

may take longer than ordinarily is the case for the reason that the parents have practically all sold and, while warranty deeds were taken in many instances, all parties had the impression that the parent could only convey a life estate and full value was not paid.

If the Torrens Land System should be enacted into law in the state, as is advocated in some quarters of great influence in state councils, what would the register do with a title of the kind involved in the case and what would become of the system if after a few years the Supreme Court of the United States should decide to reverse the decision? These are some of the questions that arise with reference to the matters involved in the case.

Supreme Court, U. S.
FILED
DEC 16 1911
JAMES H. McKENNEY,
Clerk.

(21900 and 21901.)

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

ALBERT W. SHULTHIS, *Appellant.*
vs.
D. A. McDOUGAL et al., *Appellees.*
No. 156.

GEORGE FRANKLIN BERRYHILL, *Appellant,*
vs.
ALBERT W. SHULTHIS et al., *Appellees.*
No. 157.

Brief on Behalf of George Franklin Berryhill,

Appellee in No. 156, Appellant in No. 157.

JAMES P. HARROLD,
SOLICITOR FOR GEORGE FRANKLIN BERRYHILL.

WARREN & BRUCE PRINT, OMAHA

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

ALBERT W. SHULTHIS, *Appellant,* vs. D. A. McDOUGAL et al., *Appellees.*	No. 156.
GEORGE FRANKLIN BERRYHILL, *Appellant.* vs. ALBERT W. SHULTHIS et al., *Appellees.*	No. 157.

BRIEF ON BEHALF OF GEORGE FRANKLIN BERRYHILL, Appellee in No. 156, Appellant in No. 157.

STATEMENT OF FACTS.

This suit is in the Supreme Court upon an appeal from an order of the Circuit Court of Appeals of the Eighth Circuit, affirming a decree entered in the United States Circuit Court dismissing the bill of the original complainant, Albert W. Shulthis, and the intervening petition of George Franklin Berryhill. Both Shulthis and Berryhill have appealed and the

two cases are presented to this court upon one printed record.

In so far as the rights and contentions of the intervenor, George Franklin Berryhill, are concerned, the facts of the case are practically without dispute, but these facts are of such a nature that counsel for intervenor feel they should be presented very fully in their exact connection with the propositions of law involved.

The lands in controversy in this suit are situated within the limits of the Creek Nation, one of the "Five Civilized Tribes," and down to the time of allotment, April 28, 1904, these lands were a part of the public domain of the Creek Nation.

The intervening petitioner, George Franklin Berryhill, through whom all of the parties to this litigation claim their rights in one way or another, was in 1901, and is now, a duly enrolled citizen by blood of the Creek Nation.

The individual allotment of the public lands of the Creek Nation was provided for and brought about through the operation of several acts of Congress authorizing such individual allotment, all of which became binding and effectual only after acceptance and ratification by the Creek Nation. It is important to keep in mind that these lands, before allotment, were public lands belonging to the Creek Nation as a political entity, analagous to the public lands of the United States or of any independent political state, and were not, in any sense, held by the individuals of the tribe as tenants in common. As civilization developed among the individuals of this

and the other Indian nations inhabiting the Indian Territory, it became desirable that the lands of the respective nations should be in some way reduced to a system of individual ownership.

The principal acts of Congress which were intended to effectuate this result, and which were agreed to by the Creek Nation, are:

1. The "Original Curtis Act" of June 28, 1898. (30 Stat. L. 495; Fed. Stat. Ann., Vol. 3, p. 439 *et seq.*)

2. The "Original Creek Agreement," approved by Congress on March 1, 1901, ratified by the Creek tribe on May 25, 1901.

3. Certain provisions of the Indian Appropriation Act of May 27, 1902. (32 Stat. L. 245.)

4. The "Supplemental Creek Agreement," approved by Act of Congress of June 30, 1902 (32 Stat. L. 500), ratified by the Creek Nation on July 26, 1902, and in force by proclamation of the President on August 8, 1902.

The provisions of the "Original Curtis Act" are of value here only for the purpose of showing the method and purpose of the enrollment of the members of the Creek Nation. The original roll of the Creeks was made by authority of the United States by J. W. Dunn, about the year 1867, and the Dawes Commission were directed by the Curtis Act to use this roll as a basis and to make a complete and accurate roll to be used as the foundation of a general scheme for the individual allotment of the lands of the tribe. It will be noted that the making up of these rolls was largely left to

the discretion of the Dawes Commission, and that this act did not provide for an allotment of the lands of the tribe in fee. It was the first real step, however, in the development of the policy of the government towards dealing with the Indians of this nation as individuals rather than as a tribe.

The "Original Creek Agreement" ratified by the Creek Nation on May 25, 1901, provided, among other things, that (1) only those Creek citizens born on or before July 1, 1900, should be entitled to enrollment by the Commission; (2) provided for an allotment of the lands in fee, and (3) determined what disposal should be made of the share of an enrolled member of the tribe who died before his allotment was made.

I quote the provisions which seem to be of importance in connection with the case at bar:

> SEC. 3. "All lands of said (Creek) tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be alloted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him, so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands which at their appraised value are sufficient to make his allotment equal in value to the standard so fixed."
>
> SEC. 28. "No person, except as herein pro-

vided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under section twenty-one of the act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled 'An act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and shall be allotted and distributed to them accordingly.

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

In the Indian Appropriation Act of May 27, 1902 (32 Stat. L. 245), Congress extended the provisions

regarding enrollment to all children born on or prior to May 25, 1901. This provision is as follows:

> "Provided, further, that all children born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, 1901, and then living, shall be added to the rolls of citizenship of said nation made under the provisions of an act entitled, 'An act to ratify and confirm an agreement with the Muskogee, or Creek tribe of Indians, and for other purposes,' approved March 1, 1901, and if any such child has died since the 25th day of May, 1901, or may hereafter die, before receiving his allotment of land and distributive share of the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them accordingly; and provided further, that the act entitled, 'An act to ratify and confirm an agreement with the Muskogee or Creek tribe of Indians, and for other purposes,' approved March 1, 1901, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed, and the descent and distribution of lands and moneys provided for in said act shall be in accordance with the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas in force in the Indian Territory."

A short time after a supplemental agreement with the Creek Nation was negotiated by the Commission to the Five Civilized Tribes. This agreement was approved by an act of Congress of June 30, 1902 (32 Stat. L. 500), and was ratified by the Creek tribe on July 26, 1902, and became effective by proclamation of the President on August 8, 1902. The provisions of this agreement which are of importance in the decision of the case at bar are as follows:

"DESCENT AND DISTRIBUTION.

"6. The provisions of the act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; provided, that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; and provided, further, that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49.

"ROLLS OF CITIZENSHIP.

"7. All children born to those citizens who are entitled to enrollment, as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

"8. All children who have not heretofore been listed for enrollment May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890 or upon the authenticated rolls of 1895, and entitled to enrollment as provided by the act of Congress approved March 1, 1901 (31 Stat. L. 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may

hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be allotted and distributed to them accordingly.

"16. Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain nontaxable and inalienable, and free from any incumbrance whatever for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"* * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

"17. Section 37 of the agreement ratified by said act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

'Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any

kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. * * *' "

"20. This agreement is intended to modify and supplement the agreement ratified by said act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty or law in conflict herewith."

This agreement finally fixed the basis of enrollment of the Creek citizens and forms the basis of the allotment of the land in controversy in this suit.

A study of these various enrollment acts will show that their purpose was purely to establish a list of citizens to be used as a basis for individualization of the property of the tribes. Enrollment did not in any sense carry with it the transfer or conveyance of any of the real estate. This could be brought about only by a deed from the Creek Nation and the United States.

The title to the lands in controversy originated in deeds executed by P. Porter, principal chief of the Muskogee (Creek) Nation on October 10, 1904, and approved by Ethan Allen Hitchcock, Secretary of the Interior, on October 31, 1904. (Rec., 211, 212, 213.) These deeds convey the title of the lands in controversy to the "heirs of Andrew J. Berryhill, deceased." I quote these exact words of a portion of the deed, "Exhibit F" (Rec., 213):

"Whereas, the Commission to the Five Civilized Tribes has found that Andrew J. Berryhill, a citizen of said tribe, is now dead, and said Commission has certified that the land

hereinafter described has been allotted to the heirs of said Andrew J. Berryhill.

"Now, Therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of Andrew J. Berryhill, deceased, all right, title and interest of the Muskogee (Creek) Nation, etc. * * *"

Andrew J. Berryhill, mentioned in said deed, was a son of this intervenor, George Franklin Berryhill, and his wife, Clementine Berryhill. He was born on the 6th day of May, 1901, and died in the month of November, 1901. (Rec., 201.) Under the "Original Curtis Act" and the "Original Creek Agreement" he would not have been entitled to enrollment as a member of the Creek Nation, those acts limiting the enrollment of children born to Creek citizens to those born prior to July 1, 1900. For his right to enrollment we must look to the special provisions of the Indian Appropriation Act of May 27, 1902, and the "Supplemental Creek Agreement" which became effective on August 8, 1902, certain provisions of which are quoted above. It will thus be seen that it would have been impossible for Andrew J. Berryhill, at any time during his lifetime, to become enrolled as a citizen of the Creek Nation, and a reference to the record will show that, as a matter of fact, his name was placed upon the Creek Indian roll made up by the Commission to the Five Civilized Tribes at the request of this intervenor on the 8th day of October, 1902 (Rec., 201), nearly a year after the date of his death. It is of the

greatest importance to keep this clearly in mind in connection with the contention of certain of the parties that these were "inherited" lands.

It is further provided, as quoted above, by the "Supplemental Creek Agreement" that allotted lands shall not be alienated before the expiration of five years from the date of the approval of the supplemental agreement, that is, five years from August 8, 1902.

The intervenor, George Franklin Berryhill, together with Clementine Berryhill, his wife, executed a departmental oil and gas lease to the original complainant, Albert W. Shulthis, which lease was afterwards duly approved by the Secretary of the Interior. (Rec., 202-203.) This lease is to that part of the premises described as "Lot Five of Section Six, and the Northeast quarter of the Northwest quarter of Section Eighteen, all in Township Seventeen North, Range Twelve East of the Indian Base and Meridian, containing 80.12 acres."

On June 5, 1906, after the date of the making of this lease, George Franklin Berryhill and Clementine Berryhill, his wife, executed a deed purporting to convey to Edmond McKay and Perry McKay "the Northeast quarter of the Northwest quarter of Section Eighteen and the East half of the Northwest quarter of the Northeast quarter, and the Southwest quarter of the Northwest quarter of the Northeast quarter of Section Thirteen, all in Township Seventeen North, Range Twelve East."

This deed was made less than five years after the date of the "Supplemental Creek Agreement,"

and it is contended by the intervenor that it is invalid because of the five-year limitation upon the right of alienation. (See Section 16 of the "Supplemental Creek Agreement," quoted above.)

The various defendants claim title to these lands and the rights to the oil and gas therein through two separate chains of conveyance. The first chain is based upon the deed of June 5, 1906, which this intervenor claims to be void. The second chain is through certain deeds from Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, to the defendant, D. A. McDougal (Rec., 69-79, 208), these parties claiming title as heirs of Andrew J. Berryhill, deceased. All of them are brothers and sisters of this intervenor, and the only claim through their source is that these paternal uncles of the deceased child have a remainder in fee after the life estate of this intervenor. No claim is made, so far as the record shows, under either of said deeds, to the property conveyed by the homestead deed, to-wit: "Lot Five (5), of Section Six (6), Township Seventeen (17) North, Range Twelve (12) East of the Indian Base and Meridian."

These are the essential facts in so far as they relate to or affect the rights of this intervenor. I have not undertaken in this statement to refer to that portion of the general controversy that has to do alone with the rights of the original complainant Shulthis and the other defendants.

Upon these facts and propositions this intervener has asserted the following

ASSIGNMENT OF ERRORS.

First. The court erred in dismissing the bill filed by the appellant, George Franklin Berryhill.

Second. The court erred in not entering a decree in the cause adjudging the rights and liabilities of all the parties hereto to be as prayed in the bill filed by the appellant, George Franklin Berryhill.

Third. The court erred in failing and refusing to hold and adjudge the defendants to have no interest or estate whatsoever in the land in controversy or any part thereof.

Fourth. The court erred in failing and refusing to hold and adjudge that the appellant, George Franklin Berryhill, is seized of a good and valid estate in fee in the lands in controversy, subject only to the oil and gas mining lease upon said lands, executed and delivered by the intervener and Clementine Berryhill to the complainant on the 24th day of March, 1906, as shown by the record.

Fifth. The court erred in failing and refusing to hold and adjudge that the receiver appointed in this cause pay to the intervener a sum equal to 10 per cent. of the value of all crude oil extracted by him from the lands in controversy.

Sixth. The court erred in failing and refusing to hold and adjudge that the defendant, Keifer Oil and Gas Company, pay to the appellant, George Franklin Berryhill, a sum equal to 10 per cent. of the value of all crude oil extracted from the lands in controversy by the said Keifer Oil and Gas Company.

Seventh. The court erred in failing and refusing to hold and adjudge that the defendants, and each of them, have no interest, estate or property in or to the deposits of oil and gas in and under the lands in controversy.

Eighth. The court erred in holding and adjudging that the term "inherited lands," as applied to Creek Nation, applies to all allotments selected by or for deceased members of the tribe in the hands of their heirs, whether said deceased members died before or after such allotment.

Ninth. The court erred in holding and adjudging that the warranty deed, as shown by the record, executed on the 5th day of June, 1906, by the appellant and Clementine Berryhill, his wife, to Edmond McKay and Perry McKay, was the valid deed of the grantors therein.

Tenth. The court erred in failing and refusing to hold and adjudge that the warranty deed, as shown by the record, executed on the 5th day of June, 1906, by the appellant, George Franklin Berryhill and Clementine Berryhill, father and mother of Andrew J. Berryhill, deceased, to Edmond McKay and Perry McKay, covering the lands in controversy, was void and that no interest passed thereby.

Eleventh. The court erred in holding and adjudging that the restrictions on the alienation of the land in controversy were removed by the provisions of Section 22 of an act of Congress approved April 26, 1906, entitled "An act to provide for the final disposition of the affairs of the Five Civilized Tribes in the Indian Territory and for other purposes."

Twelfth. The court erred in failing and refusing to hold and adjudge that at the time of the execution of the warranty deed by the appellant, George Franklin Berryhill, and Clementine Berryhill, his wife, to Edmond McKay and Perry McKay, on June 5, 1906, as shown by the record, that the said George Franklin Berryhill and Clementine Berryhill had no legal capacity to convey the land in controversy.

Thirteenth. The court erred in failing and refusing to hold and adjudge that the warranty deed as shown by the record, executed on the 5th day of June, 1906, by the appellant, George Franklin Berryhill and Clementine Berryhill to Edmond McKay and Perry McKay, was void, and that no interest passed thereby.

Fourteenth. The court erred in holding and adjudging that Section No. 2,531 of Mansfield's Digest of the Statutes of the State of Arkansas governed the amount, quantity, quality and the manner of

taking of the estate in the lands in controversy, that became vested in George Franklin Berryhill under and by virtue of the patents issued to the "heirs of Andrew J. Berryhill, deceased," by the United States and the Creek Nation, as shown by the record.

Fifteenth. The court erred in failing and refusing to hold and adjudge that under and by virtue of Section 2,522 of Mansfield's Digest of the Statutes of Arkansas, George Franklin Berryhill, as the father of Andrew J. Berryhill, deceased, was seized of an estate in fee simple in the lands in controversy under and by virtue of the patents, as shown by the record, issued to "the heirs of Andrew J. Berryhill, deceased," by the United States and the Creek Nation.

Sixteenth. The court erred in holding and adjudging that the lands in controversy are to be treated in the hands of the deceased Andrew J. Berryhill as an estate of inheritance from his parents.

Seventeenth. The court erred in holding and adjudging that the lands in controversy came to Andrew J. Berryhill by the blood of George Franklin Berryhill.

Eighteenth. The court erred in holding and adjudging that the lands in controversy are to be taken as though they had come to the "heirs of Andrew J. Berryhill, deceased," by descent.

Nineteenth. The court erred in failing and refusing to hold and adjudge that the lands in controversy were allotted by the United States and the Creek Nation directly to the "heirs of Andrew J. Berryhill, deceased."

Twentieth. The court erred in failing and refusing to declare null and void as clouds upon the title of this appellant to the lands in controversy various leases and conveyances, as shown by the record, under which the defendants and each of them claimed.

Twenty-first. The court erred in ordering and adjudging that the costs in this suit be taxed against the appellant, George Franklin Berryhill.

Twenty-second. The court erred in dismissing and discharging the receiver heretofore appointed in this cause.

SPECIFICATIONS OF ERROR.

The intervenor has assigned twenty-two separate errors and respectfully urges each of them upon this court as a reason for reversing the decision and order of the Circuit Court of Appeals.

In accordance with the rules of this court, however, and for greater convenience in presenting the arguments upon which he relies, the following propositions are submitted as specifications of error and urged as the reasons to be relied upon by this appellant:

First. Andrew J. Berryhill, the child through whose name upon the rolls this allotment was made, died before his name was even placed upon the rolls, and never acquired any interest or estate in the lands in controversy. He never having had title to these premises, their acquisition by the "heirs of Andrew J. Berryhill, deceased," can not be regarded as an estate of inheritance from Andrew J. Berryhill.

Second. The allotment and deed of the property in question was made by the Creek Nation and the United States directly to the "heirs of Andrew J. Berryhill, deceased," and those persons, whoever they may have been, took the lands in controversy as a fee simple estate by purchase from the Creek Nation and not by descent or inheritance.

Third. The provisions of Chapter 49 of Mans-

field's Digest of the Statutes of Arkansas establish that this intervenor, George Franklin Berryhill, is the heir nearest in the line of succession to Andrew J. Berryhill. The provision we have reference to reads as follows:

> "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenery, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:
>
> "*First.* To children, or their descendants, in equal parts.
>
> "*Second.* If there be no children, then to the father, then to the mother, if no mother, then to the brothers and sisters, or their descendants, in equal parts.
>
> "*Third.* If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

Hence, George Franklin Berryhill, by the deeds from the Creek Nation, acquired a fee simple estate in said lands, as an original allottee by purchase, and in no sense as an heir of the deceased, Andrew J. Berryhill.

Fourth. The lands in controversy, under the provisions of the "Supplemental Creek Agreement," were held by George Franklin Berryhill as the original grantee of the Creek Nation, as though they had been conveyed to him by name, and were, on

June 5, 1906, still subject to the following provisions of said agreement:

> "16. Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

This agreement was approved and became effective on August 8, 1902, hence the deed to Edmond and Perry McKay, dated June 5, 1906, from this intervenor (Rec., 203-204), was wholly void and conveyed no interest in the lands in controversy.

Fifth. The deeds of Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton, given to D. A. McDougal, purporting to convey a portion of the lands in controversy, conveyed no interest in said lands and were of no effect because said grantors had no title to any part of the premises so purported to be conveyed.

Sixth. The Circuit Court of Appeals should have directed the Circuit Court to enter a decree declaring the title to the lands in controversy to be in this intervenor, George Franklin Berryhill, subject only to the rights of the original complainant, Albert W. Shulthis, under his departmental oil and gas lease,

and declaring that the other defendants have no right, title and interest in said premises, nor any part thereof, nor in any of the proceeds thereof; and should have directed that an accounting be had by the Kiefer Oil and Gas Company as to all of the gas and oil removed by it from these lands.

BRIEF.

I shall take up the propositions set out in the specifications of error in their order, presenting the arguments and authorities in their support as briefly as possible without leaving out any essential matter.

I.

Andrew J. Berryhill died before his name was even placed upon the rolls, and never acquired any interest or estate in the lands in controversy. He never having had title to these premises, their acquisition by the "heirs of Andrew J. Berryhill, deceased," cannot be regarded as an estate of inheritance from Andrew J. Berryhill.

To understand thoroughly the intervenor's position it is necessary to keep clearly in mind four points of fact.

1. Andrew J. Berryhill was born on the 6th day of May, 1901, and died in the month of November, 1901, and during the whole of his short life he was not enrolled and was not entitled to be enrolled as a citizen of the Creek Nation, and at no time during his life had he any right, title or interest in the lands in controversy.

2. The name of Andrew J. Berryhill was placed upon the rolls of the Creek Nation by his father, this

intervenor, in accordance with the terms of the "Supplemental Creek Agreement" (which became effective on August 8, 1902) on the 8th day of October, 1902, and the commission to the Five Civilized Tribes allotted the lands in controversy long after his death to the "heirs of Andrew J. Berryhill, deceased."

3. The deeds recited the allottment as above and conveyed the lands to the "heirs of Andrew J. Berryhill, deceased," on the 10th day of October, 1904.

4. No allottment or conveyance was ever made to Andrew J. Berryhill at any time.

The first essential of an estate of inheritance is, that the one from whom it is inherited shall be seized of the estate during his lifetime:

> "We must also remember that no person can be properly such an ancestor as that an inheritance of lands or tenements can be derived from him unless he has had actual seizin of such lands either by his own entry or by the possession of his own or his ancestors' lessee for years or by receiving rent from a lessee of the freehold, or unless he had what is equivalent to corporeal seizin in hereditaments that are incorporeal. * * * But he shall not be accounted an ancestor who has had only a bare right or title to enter or be otherwise seized.
>
> And therefore all the cases which will be mentioned in the present chapter are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seized thereof."
>
> 2 Blackstone's Commentaries, p. 209.

Under the provisions of the various Creek Agreements which we have partially quoted in the statement of facts, four things were necessary to be done in order to vest a title in the individual allottee.

1. The name of the citizen must be placed upon the roll of citizens of the Creek Nation.

2. An allotment must be made by the Commission to the Five Civilized Tribes.

3. The allottee must select his allotment and forty acres as his homestead from the allotment.

4. Deeds from the Creek Nation by its principal chief approved by the Secretary of the Interior must be executed and delivered to the allottees.

The Supreme Court of the United States has not, and in fact no court of the United States (unless it be in this case) has ever directly passed upon the provisions of the statutes and agreements affecting the Creek allotments. But we are not without analagous authority throughout the United States and in this court upon the question in similar cases.

In the case of *Gjerstadengen et al.* v. *Van Duzen et al.*, 76 N. W. Rep. 233, the Supreme Court of North Dakota, in deciding a very similar question arising under the homestead laws of the United States, used the following language:

> "The land sold did not belong to the estate of Olia Mikkleson, deceased. She filed upon it as a homestead in her lifetime, but she died before the patent was issued and even before her right to demand a patent had accrued. The law gave her no such interest in the lands as could be transmitted to her heirs. Upon her death all her rights in the land under her homestead entry ceased and her heirs became entitled under the statute to a patent, not because they had succeeded to her equitable interest, but because the law gave them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. It is apparent

from the statute (Section 2291 Revised Statutes U. S.) that Congress did not intend to vest in the homesteader an interest which could be inherited under the laws of the state where the real estate might be situated, the same as other real estate, but to withhold from him such interest and specifically designate the persons who on his death should be entitled to secure the right which the original entryman would have obtained had he survived. What authority there is on the point supports our view. See *Bernier* v. *Bernier,* 147 U. S. 242; *Chapman* v. *Price* (Kans.), 4 Pacific Rep. 807. *Bernier* v. *Bernier,* 72 Mich. 43. In *Bernier* v. *Bernier,* 147 U. S. 242, the court say:

'The object of the sections in question was, as well observed by counsel, to provide the method of completing the homestead claim and obtaining the patent therefor, and not to establish a line of descent or rules of distribution of the deceased entryman's estate. They point out the conditions on which the homestead claims may be perfected and a patent obtained, and these conditions differ with the different positions in which the family of the deceased entryman is left upon his death.'

As the land did not belong to the estate of the deceased it is obvious that the court was without jurisdiction to order sale thereof. When the land directed to be sold is the property of a stranger the Probate Court possess no jurisdiction over such property, nor has it any power to try the question of title in such a proceeding or at all. Should the owner of the land appear in the proceeding and set up his title and be defeated, it would nevertheless be true that the court would be without jurisdiction, for the statutes do not contemplate that a Probate Court shall hear and determine questions relating to the title to land. * * * It is now too late for the parties, so far as they claim the land as heirs, to insist that the property ought not to

have been sold. But inasmuch as they do not in fact claim as heirs, but as independent owners, they may assail the proceedings as utterly void for want of jurisdiction in the Probate Court over the real estate which that court assumed to deal."

In a case decided in the Supreme Court of South Dakota in 1904, interpreting the provisions of the Timber Culture Act, it was held that where the deceased entered certain public lands as a timber culture claim, made his final proof and received a duplicate receiver's certificate showing payment to the United States land office of the fees required for taking and receiving testimony in the case during his life, but the patent was not issued until after his death, the legal title to the land remained in United States until the patent issued.

Gould v. *Tucker et al.*, 100 N. W. Rep. 427.

The case of *Warnell* v. *Finch*, 15 Tex. 163, is very clearly in point. This case was a suit brought to recover certain lands in Bastrop County, Texas. The father of the plaintiff in the court below, Henry Warnell, emigrated to Texas in 1834 from Arkansas, leaving there an only child, an infant, and was slain with Travis in the Alamo. A certificate was issued by the Board of Land Commissioners in 1838 to "the heirs of Henry Warnell" and a patent thereon was issued in 1841 to "the heirs of Henry Warnell." There was an inhibition in the constitution of the Republic of Texas upon alien heirs holding real estate and it was sought to defeat the suit of the plaintiff upon the ground that he was an alien, and therefore not entitled to take by inheritance from his father, Henry Warnell, but the court held that

although he could not claim by descent on account of his alienage at the time of his father's death, yet the plaintiff was entitled to recover under the description of "heir" in the certificate of patent on the ground that the laws which provided for the issuance of certificates and patents to the heirs of those who fell under Fanning, Grant, Travis, Ward and Johnson by the term "heirs" meant those persons who stood in such relation to the deceased that they would be entitled to the inheritance under the general rules of inheritance and distribution.

The Supreme Court of the State of Washington in 1903, construing the homestead law of the United States, used the following words:

> "If a homestead claimant dies before the patent issues or before the right to demand a patent has accrued, the land does not become a part of his estate. Upon his death all his rights under the homestead entry cease, and his heirs become entitled to a patent, not because they have succeeded to his equitable interest but because the law gives them preference as new homesteaders and allows the benefit of the residence of their ancestor upon the land. * * * The same principle under similar statutory provisions is applied in the case of the death of a pre-emptor. The subsequently perfected title shall inure to the benefit of the heirs, and can neither be devised by the preemptor nor sold in satisfaction of his debts or expenses of administration. * * * Moreover, a homestead cannot be made liable for debts contracted before patent issues. * * * Whatever rights survive the death of the homesteader belong to the heirs and not to the estate of the deceased. The heirs do not succeed to such rights by inheritance but by virtue of the law which merely grants to them preference rights. If they fail to exercise those

> rights, or if, as in this case, there are no heirs capable as citizens of the United States of succeeding to such rights, then there is no one else to whom any preference right survives, and the land is open as part of the public domain for occupancy by any qualified homesteader."
>
> *Towner* v. *Rodegeb,* 74 Pac. Rep. 50.

In their brief in the Court of Appeals the attorneys for the defendants sought to combat this proposition by a line of cases arising under the pre-emption laws of the United States in which it is the claim that where everything was done except the issuance of a patent and that its issuance on the part of the proper authorities was purely a ministerial act, the estate was one of inheritance and descended to the heirs. This line of authorities is best answered by the decision in the leading case of *Wittenbrock* v. *Wheadon,* 128 Calif. 150; 60 Pac. Rep. 664.

In this case the Supreme Court of California had under consideration Section 2269 of the Revised Statutes of the United States. That section is as follows:

> "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim by filing in due time all the papers essential to the establishment of the same it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same. But the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specially mentioned."

In construing this section the court says:

> "The heirs do not take the title by descent

from their ancestor, but the land is conveyed to him directly from the United States by virtue of the privilege of purchase given to them expressly by the provisions of this section. (*Dawson* v. *Mayall*, 45 Minn. 408; *Caldwell* v. *Miller*, 44 Kans. 12; affirmed in *Hutchinson Inv. Co.* v. *Caldwell*, 152 U. S. 65.) The land is not subject to devise by the pre-emptor nor can it be sold in satisfaction of his debts nor for the expenses of administration. *Rogers* v. *Clemmans*, 26 Kans. 522.

As the land is no part of the estate of Theodore Wheadon it was not subject to the probate jurisdiction of the Superior Court and is not affected by the decree of distribution of his estate subsequently made by that court. Neither is the title which inures to the heirs by the patent affected by the declaration of homestead filed by him. At the time it was filed and recorded he had no estate legal or equitable in the land, but merely a privilege which terminated at his death. The title conveyed to the heirs by the patent is not the perfecting of a title which was inchoate in him at the time of his death, but the patent is a new and independent source of title which was never affected by his declaration of homestead. * * * Under the law of this state the widow and three children were the heirs of Theodore Wheadon and became vested with the title to the land. As they did not take the land by inheritance from their ancestor but by direct conveyance from the United States, the portion taken by each heir is not determined by the law of inheritance but by the terms of the conveyance. (*Cooper* v. *Wilder*, 111 Calif. 191.) Section 2269 vests the land in them equally, and consequently the widow and each of the children took by the patent an undivided quarter of the land. (See *Sheehy* v. *Miles*, 93 Calif. 288.)"

Wittenbrock v. *Wheadon*, 128 Calif. 150; 60 Pac. Rep. 664.

The Supreme Court of Wyoming in 1905, construing the homestead laws of the United States, used this language:

> "The Supreme Court of United States has declared that the object of these sections is not to establish a line of descent or rules of distribution of the deceased entryman's estate, but to provide the method of completing the homestead claim and obtaining a patent therefor. *Bernier* v. *Bernier*, 147 U. S. 242. * * * Under Section 2291, *supra*, the heirs do not take the property by descent. They are entitled in their own right to complete the entry and receive a patent. The statute vests in them where there is no widow, upon their compliance with the prescribed regulations, all the rights to perfect and complete the entry and obtain a patent which the original entryman might have had if he had lived. They become the donees or grantees of the government. The entryman has no interest capable of disposal by will or that descends like other property to his heirs. Hence the land embraced in the entry does not become in any sense the property of the estate and does not come within the jurisdiction of the Probate Court for distribution or sale."
>
> *DeMars* v. *Hickey*, 80 Pac. Rep. 521.

In the case of *Hall* v. *Russell*, 101 U. S. 503, the Supreme Court of United States had presented to it almost exactly the question we are considering. The suit arose over an Act of Congress approved September 27, 1850, commonly known as the "Oregon Donation Act." (9 Stat. L. 496).

Section 8 of that Act provided:

> "That upon the death of any settler before the expiration of the four years continued possession, required by this act, all the rights of the deceased under this Act shall descend to the

heirs at law of such settler, including the widow where one is left, in equal parts, and proof of compliance with the conditions of this Act up to the time of the death of such settler shall be sufficient to entitle them to a patent."

Chief Justice WAITE in delivering the opinion of the court said:

"For the purposes of the present suit it is enough to show that the occupant got no title himself beyond that of a mere right of possession until he had completed his four years' continued residence and cultivation. * * * There was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years' residence and cultivation. * * *

As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession, the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence it was provided that the possessory rights of a deceased settler should go to his heirs and that they might get the land on making the requisite proof without further residence and cultivation of their own. Their title to the land was to come not from their deceased ancestors but from the United States. The title it is true was granted to them by reason of the possessory rights of their ancestor. But these were rights which they could not transfer and which passed to them under the statute without any act of his. On his death his heirs became qualified grantees. Whether they took immediately on his death or after the proof of his compliance with the provisions of the act while in life need not be decided. It is enough for this case that when their ancestor died he had nothing in the land which he could transmit to them, and what they

> afterwards got came from the United States and not from him. All his rights in the land were dependent on his completion of the four years' possession, but in consideration of what he had done Congress made his heirs the special object of its bounty, if he died before his own grant had been secured. We attach no importance to the word 'descend' as used in this section. In Section 4 the words selected to convey substantially the same idea was 'entitled.' The thing done was to give the heirs of a settler the benefit of his rights and to designate them as recipients of the bounty of the government instead of him."

Now apply the facts of the case at bar to this opinion of the court, and it will be readily seen that those facts are far within the doctrine of this case. Andrew J. Berryhill was born May 6, 1901, and died in November of that year. At the time of his birth and during the whole of his life there was no act of the United States nor agreement with the Creek Tribe entitling him to enrollment as a citizen. By the supplemental Creek Agreement effective August 8, 1902, nearly a year after his death, his name was allowed to be used as one of the units upon which to base the division of the lands of the Creek Nation. By no theory ever recognized in our law could it be said, however, that he at any time acquired either a legal or equitable right in any individual part of the lands of the Creek Nation. The provisions of this agreement gave to certain persons described as his heirs the right to take advantage of the enrollment of his name and to obtain an allotment and deed to certain of the lands of the Creek Nation. His father, this intervenor, George Franklin Berryhill, proceeding under the provisions of said act had Andrew J. Berryhill's name placed upon the rolls

of the Creek Nation on the 8th day of October, 1902. Afterwards the commission to the Five Civilized Tribes alloted the lands in controversy to the "heirs of Andrew J. Berryhill deceased," on October 10, 1904, deeds were executed by the principal chief of the Creek Nation conveying said lands to the heirs of Andrew J. Berryhill, deceased. Is it not clear under these authorities that Andrew J. Berryhill could not possibly have had any estate of inheritance and that the title acquired by his heirs came directly from the Creek Nation with the approval of the government of the United States? In order to avail themselves of the provisions of the Supplemental Creek Agreement enacted after the death of Andrew J. Berryhill, it was necessary that his heirs take certain active steps. They must first obtain his enrollment as a citizen; they must then see that an allotment is made by the Commission to the Five Civilized Tribes; they must select forty acres of such allotment as a homestead, and then apply for a deed from the Creek Nation. When Andrew J. Berryhill died he had no estate legal or equitable in any of these lands. His heirs could not exercise any right of title or ownership in said lands by virtue of their descent, and they could only acquire any right or title to the lands by actively taking the steps necessary and thus establishing themselves as persons entitled to receive an allotment from the Creek Nation under the provisions of the Supplemental Creek Agreement. As additional authority supporting these propositions counsel also cite the following cases:

McCune v. *Essig*, 122 Fed. Rep. 588.

Marley v. *Sturkert,* (Neb.) 86, N. W. Rep. 1056.

Kelsay v. *Eaton,* (Ore.) 76 Pac. Rep. 770.

Haun v. *Martin,* 48 Ore. 304; 86 Pac. Rep. 371.

Warner Valley Stock Co. v. *Morrow* (Ore.), 86 Pac. Rep. 369.

Aspey v. *Barry* (S. Dak.), 83 N. W. Rep. 91.

Quinn v. *Ladd* (Ore.), 59 Pac. Rep. 457.

Caldwell v. *Miller* (Kan.), 23 Pac. Rep. 946.

Kuhn v. *Kuhn* (Iowa), 101 N. W. Rep. 151.

Phillips v. *Carpenter* (Iowa), 44 N. W. Rep. 898.

Rausch v. *Moore,* 48 Iowa 611.

Blackman v. *Wadsworth* (Iowa), 21 N. W. Rep. 190.

It is a familiar doctrine that the contemporaneous construction of a statute by the executive authorities will be given weight in considering its meaning by the courts. In that connection we wish to cite a construction of the original Creek Agreement in an opinion rendered the Commissioner of Indian Affairs in the case of Melissa Wiley. This case involved the construction of Section 38 of the original Creek Agreement. I quote from the secretary's opinion as follows:

> "It appears that Mellissa Wiley, the lessor, is the daughter of Martha Wiley who was a citizen of the Creek Nation and who died August 26, 1899. That on the 21st day of October, 1899, an allotment was selected presumably under the Act of Congress, approved June 28, 1898, in her name, and the application for the allotment and selection was accepted by the Commission of the Five Civilized Tribes. No ratification was ever

made by the Creek Nation of the provisions of the Act of June 28, 1898.

"The Act of March 1, 1901, became a law May 25, 1901, by ratification of the Creek Council, the said Act being generally referred to as the First Creek Agreement. Section 28 of said Act provides that:

'All citizens who were living on the first day of April, 1899 entitled to be enrolled under Section 21 of the Act of Congress, approved June 28, 1898, entitled 'An Act for the Protection of the People of the Indian Territory and for Other Purposes,' shall be placed upon the rolls to be made by said Commissioner under said Act of Congress. And if any such citizen has died since that time or may hereafter die before receiving his allotment of lands and distributive share of all the funds of the Tribe, the lands and money to which he would be entitled, if living, shall descend to the heirs according to laws of descent and distribution of the Creek Nation and be alloted and distributed to them accordingly.'

"There cannot be a grant unless there was a grantee, and consequently there cannot be a present grant unless there is a present grantee. (See case of *Hall* v. *Russell*, 101 U. S. 503.) Adhering to this principle it must be held then that persons dying prior to May 25, 1901, who were entitled to enrollment is they were living April 1, 1899, are to be considered as units of allotment and distribution, and the interest such persons would have received had they lived passed by virtue of said Act to others.

Martha Wiley was living April 1, 1899. She died long before the Act of March 1, 1901, became effective. Melissa Wiley was her nearest relative and became the qualified grantee and she took the allotment (that would have been the property of Martha Wiley had she lived) not by virtue of inheritance but by grant from the Creek Nation in accordance with the Acts of Congress referred to, which were ratified by the Creek Counsel * * *."

II.

The allotment and the deed of the property in question was made by the Creek Nation and the United States directly to the "heirs of Andrew J. Berryhill, deceased," and those persons, whoever they may have been, took the land in controversy as a fee simple estate by purchase from the Creek Nation and not by descent or as heirs of Andrew J. Berryhill.

It is the contention of the intervenor that the expression "heirs of Andrew J. Berryhill, deceased," is simply a descriptive phrase designating the particular person or persons intended by Congress and the Creek Nation to be invested with the land; that these persons did not take by virtue of their relationship to Andrew J. Berryhill as descendants, but because of the fact that they constituted the particular class of persons who were so designated in the deed or patent.

The provisions of the supplemental Creek agreement which are especially applicable to the acquisition by this intervenor of the property in controversy read as follows:

> "SEC. 6: The provisions of the Act of Congress approved March 1, 1901, in so far as they provide for descent and distribution according to the laws of the Creek Nation are hereby repealed, and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory: Provided that only citizens of the Creek Nation, male and female, and their

Creek descendants shall inherit lands of the Creek Nation: And provided further that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49.

SEC. 7: All children born to those citizens who are entitled to enrollment as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided and be alloted and distributed to them accordingly."

Under Section 7, here quoted, it was possible to add names to the roll of Creek citizens after the death of the person whose name was so added, and in accordance therewith the name of Andrew J. Berryhill was placed upon the roll of the Creek Nation after his death. This act manifestly did not vest title to any portion of the lands of the Creek Nation in Andrew J. Berryhill. It simply made it possible that the name of Andrew J. Berryhill should be placed upon the roll and used as a unit of allotment. The allotment in this case was not made to Andrew J. Berryhill, but was made, under the provisions of this statute, to the "heirs of Andrew J. Berryhill, deceased."

Washburn on Real Property, Vol. III, p. 4, lays down in apt words the principle governing all acquisitions of title to real estate:

> "In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring title to land, namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law."

This statement of Washburn's is supported by all the adjudicated cases without exception, and, as we attempted to show in our discussion under the preceding head, Andrew J. Berryhill never had an estate of inheritance of any kind in the land in controversy, and therefore his heir could not become substituted for him as owner by the act of the law. This position is so fundamentally sound that it has not been seriously controverted either by appellee or in the opinion of the Circuit Court or of the Circuit Court of Appeals. Contention has been made, however, that the words of the supplemental Creek agreement, "descend to the heirs," justify the court in considering the lands as having vested in the ancestor, Andrew J. Berryhill, during his lifetime. In other words, that the word "descend" shows an intention on the part of Congress and the Creek Nation to have such a case considered as one of title by descent and not by purchase. For such a position there is absolutely no authority, and we submit that the position is not borne out by reason. The word "descend" has a well-defined meaning in the common law and in our statute law. The essential for a title by descent must exist before land can be said technically to descend, and if the word "descend" is used in the statute, where it is not techni-

cally applicable, the courts will not shape the statute to fit the word but will give to the word a non-technical meaning such as "to vest in," "to pass," etc.

Tate v. *Townsend,* 16 Miss. 316-319.

Johnson v. *Morton,* 10 Pa. St. 245.

Borgner v. *Brown,* (Ind.) 33 N. E. Rep. 92.

Brooks v. *Kip,* (N. J.) 35 Atl. Rep. 658-660.

Aydlett v. *Swope,* (Tenn.) 17 S. W. Rep. 208.

Halstead v. *Hall,* 60 Md. 209.

Barclay v. *Cameron,* 25 Tex. 242.

Stratton v. *McKinne,* (Tenn.) 62 S. W. Rep. 636-640.

Meadowcroft v. *Winnebago Co.,* (Ill.) 54 N. E. Rep. 949.

Starr v. *Hamilton,* (U. S.) 22 Fed. Cas. 1107.

Spangenberg v. *Guiney,* 3 Ohio Dec. 163.

Doren v. *Gilum* (Ind.), 35 N. E. Rep. 1101.

This proposition is the same in principle as the first one, and in a manner a corollary of it. Hence all the cases that we have cited and discussed under that proposition are applicable here, and we respectfully ask the court's attention to them in support of this proposition. In the case of *Cooper* v. *Wilder* (2 Calif.), 43 Pac. Rep. 591, the court, in discussing a situation very similar to the one in the case at bar, arising under the "Timber Culture Act," says:

> "We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased. The grant is to the heirs of David

> Cooper, but they do not take by inheritance. The heirs will, therefore, take equally, regardless of the proportions in which they would have taken under the law of succession of the state. The United States has no general law of succession. The heirs must, therefore, be found by the law of the state or territory in which the land is situated. By the law of this state the widow is an heir of the husband. The plaintiff and the widow would, therefore, take equally."

Pursuant to the provisions of the Supplemental Creek Agreement the land in controversy was allotted, and deed was issued to the "heirs of Andrew J. Berryhill, deceased." The word "heirs" defines the grantee or grantees as a class. It is a description of the person or persons who take under the patent, and has no relation to the quality or quantity of the interest. It has been held in a long line of cases that where heirs are so designated they take equally, regardless of the shares or proportions they would have taken had the title come to them by descent.

McCrea's Appeal (Pa.), 36 Atl. Rep. 412.

Auman v. *Auman,* 21 Penn. St. 348.

Leathers v. *Gray* (N. C.), 2 S. E. Rep. 455.

Starnes v. *Hill,* 112 N. C. 1.

Durbin v. *Redman* (Ind.), 40 N. E. Rep. 133.

Wilburn v. *Wilburn,* 83 Ind. 55.

Fabens v. *Fabens* (Mass.) 5 N. E. Rep. 650.

Brown v. *Belmarde,* 3 Kans. 40.

Aspey v. *Barry* (S. Dak.), 83 N. W. Rep. 91.

III.

The provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas established that this intervenor, George Franklin Berryhill, is the heir nearest in the line of succession to Andrew J. Berryhill, deceased. Hence, George Franklin Berryhill, by the deed from the Creek Nation, acquired a fee simple estate in lands as an original allottee by purchase, and in no sense as an estate of inheritance.

If our first and second propositions be established, that Andrew J. Berryhill had no estate of inheritance in the lands in controversy and that said lands passed to his heirs as an estate of purchase and not of descent, it immediately becomes necessary to determine just who is the heir or who are the heirs of Andrew J. Berryhill, deceased.

The provisions to which we must resort in order to determine this question, are Sections 6 and 7 of the Supplemental Creek Agreement heretofore quoted. The particular portion of Section 7 which determines this question is as follows:

> "And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the Tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly."

The words "as herein provided" refer back to that portion of Section 6 which says that the descent

and distribution of land and money provided by the Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas. Section 1 of said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, being Section 2522 of said Digest as numerically numbered and generally referred to is as follows:

> "When any person shall die, having title to any real estate of inheritance, or personal estate not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary to his kindred, male and female, subject to the payment of his debts and the widow's dower in the following manner:
>
> First. To children, or their descendants, in equal parts.
>
> Second. If there be no children, then to the father, then to the mother; if no mother, then to the brothers and sisters, or their descendants, in equal parts.
>
> Third. If there be no children nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants in equal parts, and so on in other cases without end, passing to the nearest lineal ancestor and their children and their descendants in equal parts."

Appellee in his brief in the Court of Appeals insists that in order to determine who are the heirs of Andrew J. Berryhill, deceased, it would be necessary also to resort to Section 2531 of Mansfield's Digest (Section 10 of Chapter 49). This section is as follows:

> "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate or so much

> therefore as came by the mother shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend in remainder to the collateral kindred of the intestate in the manner provided in this act; and in default of a father, then to the mother for her lifetime; then to descend to the collateral heirs as before provided."

From a reading of these two sections it would seem as if they were intended to have very distinct and separate purposes in the mind of the legislature:

First: Section 2522 determines the person or persons who are to be regarded as the heirs of one deceased, and the personnel of those heirs is finally determined by this section in all cases.

Second: Section 2531 does not modify nor change the other section in any manner, in so far as it refers to the persons left as heirs by one deceased. This section, however, goes on and fixes the quality and extent taken by the heirs from an ancestor, where the ancestor held title at the time of his decease. It needs only a reading of that section to make it obvious that it could have no application to a case in which property does not descend from an ancestor, but is taken as by purchase from some source outside of the ancestor.

This section can only be made applicable to an estate that has become vested in an ancestor, in order to determine what portion of the estate shall be transferred by operation of law to the heir. Andrew J. Berryhill never at any time during his life had any title or estate in the premises in controversy. His name was simply one of the units of distribution

in the arbitrary scheme fixed by the Creek Nation and Congress in order to facilitate the individual allotment of the land to the Creek Nation. The effect of the Supplemental Creek Agreement in allowing his name to be placed on the roll was to provide a means whereby an allotment of the portion of the lands of the Creek Nation should be made to those persons designated as his heirs. This question is very convincingly discussed in the case of *Ward* v. *Stow*, decided by the Supreme Court of North Carolina and reported in 27 American Decisions 238. We quote from the opinion as follows:

> "Here the donees do not take by descent for their ancestor had no estate, which the word heirs can expand into an estate of inheritance. They do not, therefore, take as heirs, but simply as purchasers. But it is insisted for the plaintiff that nevertheless they are described as heirs that the law of descent is necessarily referred to for the understanding of that term and the ascertainment of the persons thereby intended; and, therefore, this law is to regulate also the shares in which the thing given is to be enjoyed by those on whom it is bestowed. With the highest respect for those who have drawn this inference we are compelled to say that we do not feel its force. Every voluntary disposition of property takes effect according to the agreement of the contracting parties. Their intentions properly expressed give the mode and form that constitute the law of conveyance. The regulations of the state for the transmission of inheritance left vacant by death do not *propria vigore* operate on the subject-matter of such conveyances, and can apply to them only so far as the parties have adopted them and directed them to be so applied. When a technical phrase is deliberately used it is reasonable to suppose that it is employed in the

sense appropriated to it in the science or art from which it has been taken and that science or art is very properly consulted for its interpretation.

'Heirs' is a well known term in the law of descent and when donees or devisees are not otherwise described than as heirs the law is impliedly referred to for meaning of the term. But whether these donees or devisees are to take much or little, for a long or short time, all together or by moieties in equal or unequal portions, the law of descent can give no information, for, it has made no provision in relation to these matters, but has left all these to be regulated by the law which the parties may have themselves made in their conveyance. * * * The term 'heirs' has here but a single meaning, and can produce, as we think, but a single effect. It is not pretended or assumed to be a word of limitation. It directs nothing as to the devolution or succession of the estate after it is invested in the original devisee or first taker. And its sole purpose seems to be to point that out. An estate not of inheritance, an estate for life or a term of years or a chattel may be limited to persons not otherwise described than as the heirs or heirs of the body of a deceased person, and so an estate of inheritance may be limited to persons thus designated, without any attempt to direct its transmission as in the course of descent from that ancestor.

In the first class of cases the word 'heirs' is necessarily and in the last case is obviously one simply of description whereby the donor or testator declares under a general term instead of mentioning by their names the persons whom he contemplates as donees or devisees of his property. It is a collective term so far only, as is every term which may comprehend within it more individuals than one. But it is not collective as calling in the whole succession of heirs to the deceased person. Whenever a descriptive

> phrase is used in any conveyance instead of an actual nomination the import of the phrase must be attended to in order to find out the persons meant by it. If it be seen that by the term 'heirs' those are intended who at the time referred to were or might be the heirs at law of the deceased ancestor, of course the law must be consulted to enable the inquirer to determine who answers to this description and who, therefore, are the first takers. But this determined, the sole purpose of the reference is over and the persons thus ascertained take simply and purely by virtue of the conveyance in their own person, not as the representatives of others, precisely as though they had been individually named or had been described by any other phrase sufficiently explicit to point them out."

The words above quoted may very aptly be applied in every respect to the situation in the case at bar. The words "descent" and "heirs," as used in the section of the "Supplemental Creek Agreement" and the words "heirs of Andrew J. Berryhill, deceased," as used in the deeds to the lands in controversy, are merely descriptive terms designating the persons to whom these lands of the Creek Nation shall be allotted. At the time of his death Andrew J. Berryhill left him surviving no children or descendants of a child. Having no child or descendants the second provision of Section 2522 must be resorted to. This section provides that if there be no children the heirs shall be first the father, second the mother, third, brothers and sisters or their descendants in equal parts. We need go no further to determine the heir of Andrew J. Berryhill, deceased. Under this provision there was only one person left surviving at the time of his death who

could be regarded as his heir, namely, his father, this intervenor, George Franklin Berryhill. He did leave certain other relatives, brothers and sisters of his father, by deeds from whom the defendant McDougal makes claim of title, but obviously under Section 2522 these persons could not be regarded as heirs of Andrew J. Berryhill, deceased. The provisions of Mansfield's Digest of the Statutes of Arkansas regarding descent and distribution are very exhaustively discussed in the case of *Kelley's Heirs* v. *McGuire*, 15 Ark. 555. A careful reading of that decision will show that Section 10 of Chapter 49 (General Section 2531) can be of no binding force in a case such as the one at bar.

The following cases are cited in support of the doctrine above discussed, as well as generally, upon the question of whether title is acquired by purchase or descent. These questions are so firmly interlaced with one another that they cannot be very well separated and discussed independently.

Burke v. *Modern Woodmen of America*, 84 Pac. Rep. 275.

Cooper v. *Wilder*, 43 Pac. Rep. 591.

Polk v. *Sleeper*, 112 Pac. Rep. 180.

Hohn v. *Bidwell*, 130 N. W. Rep. 837.

Maynard v. *Hill*, 125 U. S. 190.

Traver v. *Tribou*, 15 Fed. Rep. 25.

Hershberger v. *Blewett*, 55 Fed. Rep. 170.

McCune v. *Essig*, 199 U. S. 382.

Webb v. *Webb*, 15 Tex. 274.

Labish v. *Hardy*, 77 Cal. 327.

Harris v. *Harris* (Cal.), 12 Pac. Rep. 274.

Gafford v. *Foster* (Tex.), 81 S. W. Rep. 63.
Quinn v. *Ladd* (Ore.), 59 Pac. Rep. 457.
Farris v. *Hayes,* 9 Ore. 81.
Vance v. *Burbank,* 101 U. S. 514.
Patawa v. *United States,* 132 Fed. Rep. 893.
Braun v. *Mathieson* (Ia.), 116 N. W. 789.

The argument is advanced on behalf of appellees and discussed with some favor in the opinions of the Circuit Court and the Circuit Court of Appeals, that while this was not in a true sense an estate of inheritance from Andrew J. Berryhill, deceased, yet that the words of the Creek Agreement indicated that it was the general intention of all of the legislation regarding the Indian lands to recognize the ownership of said lands in a manner as tenancies in common in the members of the Tribe, and therefore to hold that Andrew J. Berryhill was really by virtue of his birth an owner of a part of these lands, and hence that his interest would go by inheritance. No authority is quoted however for such position, and we submit that none can be found. On the contrary it has been repeatedly decided that the lands of Indian Tribes as set apart for them under the various treaties and agreements with United States belong to them as policical societies and not to the individual members.

Cherokee Trust Funds, 117 U. S. 288.
Deleware Indians v. *Cherokee Indians,* 193 U. S. 127.
Cherokee Nation v. *Journeycake,* 155 U. S. 196.

In the case of *Fleming* v. *McCurtain,* 215 U. S. 56,

the court, in discussing the nature of the title of the Choctaw and Chickasaw Indians to their own lands in the Indian Territory, says:

> "There is not a suggestion of any trust in the language to either the technical or unlearned reader, and it is most unlikely that the United States would have attempted to impose one upon the Choctaws in favor of the existing members of the Tribe in the very treaty that dealt with them as a quasi-independent nation, recognized by Article 5 as having the right to make war, and that by the Fourth Article bound the United States to secure to that nation the jurisdiction and government of all the persons and property that may be within their limits west, etc. It is true that in further promising to secure the nation from all laws except those enacted by their own national councils the Fourth Article adds, 'Not inconsistent with the constitution, treaties and laws of the United States;' but this addition is far from suggesting that a constitutional right of property has been conferred upon a designated class that might be enforced in a Circuit Court of the United States by a bill in equity against what is called a Nation. How far any one was from that understanding, or from doubting that all the rights granted by the United States were in the Choctaw nation, is shown by the treaty with the Chickasaws, upon which the plaintiffs rely. The nation had no right to make that treaty as it did, if it was subject to the trust supposed."

Sac and Fox Indians v. *Sac and Fox Indians*, 220 U. S. 481.

Cherokee Nation v. *Hitchcock*, 187 U. S. 294.

Lone Wolf v. *Hitchcock*, 187 U. S. 553.

The United States Government during all of its early negotiations and transactions with the Indian

Tribes regarded them as separate political entities and treated with them in a manner as independent nations. While it is true that little recourse was left to the Indians in case that United States saw fit to break these agreements, yet in a proper discussion of the rights of members of a Tribe, or of a Tribe, with the United States it must always be presumed that these agreements were entered into voluntarily and that their provisions were intended to be carried out. When the Creek Indians took up their residence in the Indian Territory their lands were set apart to them by the United States government to all intents and purposes as lands would have been granted and conveyed to an independent state. It would not be contended for a moment that if the United States ceded a tract of land to the State of Illinois that such land would be held by the citizens of Illinois as tenants in common. The method of individual allotment of the land of this and the other Indian Nations was not necessarily in contemplation at the time title was acquired from the United States government. That the land should be so divided was a later development of the relations between the government of the United States and the Indians. Therefore, we cannot see that there is any ground of reason and we have been unable to find any authority to warrant the conclusion in this regard of Judge Amidon in the Circuit Court of Appeals.

Patents or deeds to this property are given by the Creek Nation with the approval of the proper United States authority in accordance with the agreements of the United States and the Creek Nation, and we can see no reason why those deeds should not be re-

garded in exactly the same light as patents from United States government or from an independent state.

The discussion of what constitutes a new acquisition under Section 2531 of Mansfield's Digest is probably settled by the decisions of the Courts of Arkansas, but this question is of no consequence under our theory of the case, our whole contention being based upon the fact that Andrew J. Berryhill never had any estate in nor title to the lands in controversy. If the contention of Judge Amidon be correct that it was intended by those who formulated the Supplemental Creek Agreements to regard such estates as those of inheritance, whether vested or not, then there may be some reason in the position taken by that court as to whether the property be regarded as a new acquisition or an acquisition of inheritance from his parents. It still seems to us, however, that to regard Andrew J. Berryhill as in any sense possessed of an estate of inheritance in these lands at the time of his death would be a wholly unwarranted application of the laws of inheritance not sanctioned by reason and not supported by a single authority.

Counsel for appellee cites a number of Massachusetts cases in support of the proposition that the court should take into consideration Section 2531 of Mansfield's Digest in determining who should take as heirs of Andrew J. Berryhill, deceased.

These cases are all distinguishable from the case at bar, and in fact have no application because it is inherently necessary to any application of Section 2531 that some estate must be vested in an ancestor. That section does not define generally the quantity

of estate taken by particular heirs but establishes certain methods of descent dependent upon a certain manner of seizin by the ancestor, how can such a section be applied to a state of facts in which the ancestor never had seizin?

IV.

The lands in controversy under the provisions of the Supplemental Creek Agreement were held by George Franklin Berryhill as though they had been conveyed to him by name, and were not in an estate of inheritance. Hence, the deed to Edmond and Perry McKay of June 5, 1906, was wholly void under the restrictions upon alienation fixed in said Agreement for five years after August 8, 1902.

Section 16 of the Supplemental Creek Agreement provides:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this Supplemental Agreement, except with the approval of the Secretary of the Interior. * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

This provision remained in full force and effect at the time of the execution of the McKay deed, ex-

cept as modified by Section 22 of an Act of Congress, approved April 26, 1906. That section is as follows:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the lands of the Tribe to which he or she belongs, or belonged may sell and convey the lands inherited from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in the sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a state or territory, then by the proper court of the county in which said minor or minors may reside or in which said real estate is situated, upon an order of such court, made upon petition filed by guardian. All conveyances made under this provision by heirs who are full blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

The deed to Edmond and Perry McKay from this intervenor was not approved by the Secretary of the Interior. We therefore submit that the deed is void and not susceptible of ratification in any manner, and that this intervener cannot be subjected to any rule of estoppel to prevent his assertion of its invalidity. The record will show that by this deed the intervenor, for a consideration of $2,000, assumed to part with all his title and interest in the premises, making no reservations whatsoever. The record will also show that before this case had been decided in the Circuit Court of Appeals, and within less than four years from the date of the making of

this deed, these premises had yielded to the receiver in possession, under agreement of the parties, between sixty and one hundred thousand dollars in profits from the oil underneath said lands, besides what had been taken therefrom by the defendants prior to the beginning of these proceedings. And it will also show that said lands are still producing, and will probably continue to produce for a long period, oil to the value of about $5,000 per month.

All clauses in restraint of alienation in the different agreements with the various Indian tribes have for their object the prevention of just such unconscionable contracts as this. The Act of April 26, 1906, does not remove the restriction in the case of any lands, the title to which is in the original allottee and grantee, and nothing but an extremely strained interpretation can possibly make that section apply to such a situation as the one in this case. If the lands in controversy were taken by this intervenor, as the original allottee, and by purchase and not by descent or inheritance, as we think is fully borne out by the authorities quoted above, then clearly this intervenor had no capacity to make the deed to the McKays on June 5, 1906.

The words "inherited lands", as they appear in the Act of April 26, 1906, have a clearly defined meaning that cannot be mistaken. That is, lands of which the ancestor died seized, and which vest in the descendants by process of law on the death of the ancestor. There is nothing in the language of this Act to raise any question as to the meaning of the words. It is a well known rule of construction that where the legislature makes use of a word of a

well known and definite sense in the law, the courts will receive and expound it in that sense in the statute; and if the word has a technical meaning, it will be taken in a technical sense.

Lewis' Sutherland on Statutory Construction, Sections 390, 393, 398.

Buckner v. *Real Estate Bank,* 5 Ark. 536.

State v. *B. & O. R. R. Co.,* 38 Am. Dec. 320.

Ex parte Vincent (Ala.), 62 Am. Dec. 717.

Harris v. *Reynolds* (Calif.), 73 Am. Dec. 62.

Quigley v. *Gorham* (Calif.), 63 Am. Dec. 139.

Hillhouse v. *Chester,* 3 Am. Dec. 267.

Thornley v. *United States,* 113 U. S. 310.

St. P. M. & M. R. R. Co. v. *Phelps,* 137 U. S. 528.

Lake County Coms. v. *Rollins,* 130 U. S. 662.

V.

The deeds of Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer, and Josie Morton given to D. A. McDougall, purporting to convey a portion of the lands in controversy, conveyed no interest in said lands, and were of no effect, because said grantors had no title to any part of the premises so purported to be conveyed.

This proposition is entirely dependent upon and must follow the decision of propositions II and III heretofore submitted. The only theory upon which

these grantors would have any interest in the premises is that the deceased, Andrew J. Berryhill, was seized during his life time of an estate in inheritance in the lands in controversy as a new acquisition, and that such an estate of inheritance passed to this intervener, George Franklin Berryhill, for life, with a remainder to these grantors. Further argument of the proposition would merely be reiteration of what was said above, and the authorities quoted would be repetition. Hence, we submit the proposition by way of making our contentions logically complete.

VI.

The Circuit Court of Appeals should have directed the Circuit Court to enter a decree declaring the title to the lands in controversy to be in this intervenor, George Franklin Berryhill, subject only to the rights of the original complainant, Albert W. Shulthis, under his departmental oil and gas lease, and declaring that the other defendants have no right, title or interest in said premises, nor in any part thereof, nor in any of the proceeds thereof, and should have directed that an accounting be had by the Kiefer Oil and Gas Company as to all the gas and oil removed by it from these lands.

This proposition is also a corollary of Points I, II, III and IV, and we respectfully submit the consideration of the authorities heretofore cited.

In view of the fact that appellees also asserted in

their brief in the Circuit Court of Appeals that the courts of equity of the United States had no jurisdiction to grant the relief prayed, we submit the following authorities upon that point, as well as calling attention to the fact that the appellees waived all question of jurisdiction by consenting to the appointment of a receiver to have charge of and operate the wells upon these premises during the pendency of this litigation.

Graves v. *Ashburn*, 215 U. S. 331.

Preteca v. *Maxwell Land Grant Co.* (C. C. A.), 50 Fed. 674.

Big Six Developing Co. v. *Mitchell* (C. C. A.), 138 Fed. 279.

Oolagah Coal Co. v. *McCaleb* (C. C. A.), 68 Fed. 87.

Alleghany Oil Co. v. *Snyder* (C. C. A.), 106 Fed. 764.

Peck v. *Ayers & L. Tie Co.* (C. C. A.), 116 Fed. 273.

Logan Natural Gas Co. v. *Southern Gas and Oil Co.* (C. C. A.), 126 Fed. 623.

Hammond v. *Winchester* (Ala.), 2 So. Rep. 892.

Jerome v. *Ross* (N. Y.), 11 Am. Dec. 484.

West Point Iron Co. v. *Reymert*, 45 N. Y. 703.

Bettman v. *Harness* (W. Va.), 26 S. E. Rep. 271.

Williamson v. *Jones* (W. Va.), 64 Am. Dec. 391.

Kelly v. *Keys* (Pa.), 62 Atl. Rep. 911.

Dark v. *Johnston*, 55 Pa. St. 164.

Union Petroleum Co. v. *Bliven Petroleum Co.*, 72 Pa. St. 173.

Watford Oil and Gas Co. v. *Shipman* (Ill.), 84 N. E. Rep. 53.

Gillespie v. *Fulton Oil and Gas Co.* (Ill.), 86 N. E. Rep. 219.

Kolachny v. *Galbreath* (Okla.), 110 Pac. Rep. 902.

We, therefore, respectfully submit that this court should reverse the findings of the Circuit Court of Appeals, and direct that the case be remanded to the Circuit Court of the United States to enter a decree in accordance with the contentions herein set forth, declaring the title to all of said premises in controversy to be in fee simple in this intervenor, George Franklin Berryhill.

Respectfully submitted.

JAMES P. HARROLD,
Solicitor for George Franklin Berryhill.

[redacted]

Supreme Court of the [redacted]

October Term, 1911

No. 148

ALBERT W. SMULTEA, Appellant,

vs.

D. A. McDOUGAL, EDWARD GRANT, JERRY MEANS, The KEEPER OF THE JAIL LOMBARD and GEORGE FRANKLIN EBERTHEIM, Appellees.

No. 149

GEORGE FRANKLIN EBERTHEIM, Appellant,

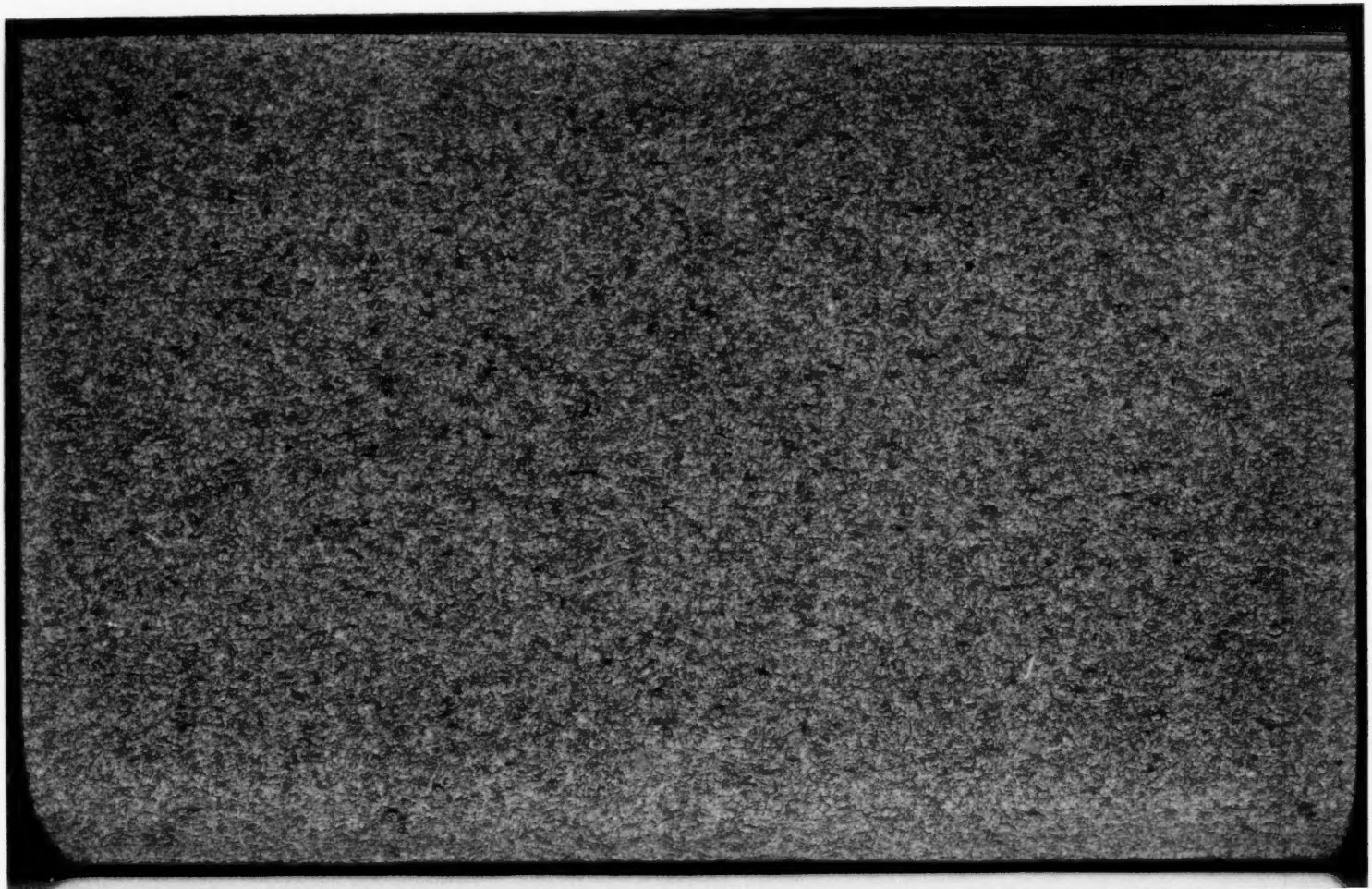
vs.

ALBERT W. SMULTEA, D. A. McDOUGAL, EDWARD GRANT, JERRY MEANS, and The KEEPER OF THE JAIL LOMBARD, Appellees.

BRIEF ON BEHALF OF ALBERT W. SMULTEA, Appellant in No. 148, Appellee in No. 149.

[redacted]

Solicitors for Appellant, Albert W. Smultea.



In the

SUPREME COURT *of the* UNITED STATES

October Term, 1911.

No. 156.

ALBERT W. SHULTHIS, *Appellant,*

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, *The* KIEFER OIL & GAS COMPANY *and* GEORGE FRANKLIN BERRYHILL, *Appellees.*

No. 157.

GEORGE FRANKLIN BERRYHILL, *Appellant,*

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY *and The* KIEFER OIL & GAS COMPANY, *Appellees.*

STATEMENT

May It Please the Court:

This is a suit in equity brought in the Circuit Court of the United States for the Eastern District of the State of

Oklahoma, by the appellant, Albert W. Shulthis, wherein he asserts his right to the oil and gas in and under the lands in controversy.

The facts in this case are quite complicated, and involve the construction and interpretation of various Acts of Congress and Treaties with the Creek, or Muskogee, Nation of Indians in Oklahoma. The facts, as stated by the honorable Circuit Court of Appeals for the Eighth Circuit in its opinion, can best be stated by "unfolding the facts and the law together."

The lands in controversy in this cause are valuable chiefly for oil and gas, and prior to this time oil to the value of over $100,000.00 has been extracted therefrom.

This appellant asserts his right to the oil and gas in and under the land under and by virtue of an oil and gas lease which reserves to his lessor a ten per cent royalty. He prays that the appellees, D. A. McDougal, Edmond McKay, Perry McKay and The Kiefer Oil and Gas Company be enjoined from interfering with his use and occupancy of the land under his said lease, and from entering upon and operating the land for oil and gas mining purposes; and prays that the clouds cast upon his right and title by the adverse claims of said appellees be removed, and that an accounting be had, and that he recover damages for being wrongfully kept out of the possession of the lands by the appellees.

The land in controversy is situated within the limits of the Creek Nation or Tribe of Indians, and remained unallotted land until April 28, 1904. That is, up until April 28, 1904, the land remained a part of the public domain of the Creek Nation. On that date the land was allotted by the Commission to the Five Civilized Tribes to the "Heirs of Andrew J. Berryhill, deceased."

One of the primary matters to be determined by this

Honorable Court is: Who were the heirs of Andrew J. Berryhill? It therefore becomes necessary to make a somewhat extended statement as to the allotment of this particular piece of land.

The first Act of Congress providing for the allotment of lands in the Creek Nation was approved April 28, 1898 (30 Stat. L. 495), and is known as the "Original Curtis Act." This Act in so far as it provides for the allotment of lands in the Creek Nation, is as follows:

> "*Sec. 11.* That when the roll of citizenship of any one of said nations or tribes is fully completed as provided by law, and the survey of the lands of said nation or tribe is also completed, the Commission heretofore appointed under Acts of Congress, and known as the 'Dawes Commission,' shall proceed to allot the exclusive use and occupancy of the surface of all the lands of said nation or tribe susceptible of allotment among the citizens thereof, as shown by said roll, giving to each, as far as possible, his fair and equal share thereof, considering the nature and fertility of the soil, location, and value of the same; but all oil, coal, asphalt, and mineral deposits in the lands of any tribe are reserved to such tribe, and no allotment of such lands shall carry the title to such oil, coal, asphalt or mineral deposits * * *.
>
> "*Sec. 12.* That when report of allotments of lands of any tribe shall be made to the Secretary of the Interior as hereinbefore provided, he shall make a record thereof, and when he shall confirm such allotments the allottees shall remain in peaceable and undisturbed possession thereof, subject to the provisions of this act.
>
> "*Sec. 13.* That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to leasing of oil, coal, asphalt, and other minerals in said Territory, and all such leases shall be made by the Secretary of the Interior; and any lease for any such minerals otherwise made shall be absolutely void * * *

> *"Sec. 21.* * * * Said Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made, with such intermarried white persons as may be entitled to Choctaw and Chickasaw citizenship under the treaties and the laws of said tribes. * * *.
>
> The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

An extended consideration of this Act is not material to this case; and we desire to direct the Court's attention, in passing, to but three matters set forth in the Act: *(1)* The making up of the rolls of citizens of the Creek Nation was left almost entirely to the discretion of the Dawes Commission. *(2)* The surface only, and not the fee of the lands, was to be allotted to the individual citizens of the tribe. *(3)* Oil and gas mining leases could only be *made* by the Secretary of the Interior, and not by the individual citizens.

Now, Andrew J. Berryhill was not born until May 6, 1901, and he died in the month of November, 1901, so that neither he nor his heirs were entitled to enrollment or allotment under this Act of April 28, 1898.

The next Act of Congress affecting the enrollment of citizens and the allotment of lands in the Creek Nation, is an Act known as the "Original Creek Agreement" made with the Creek Nation in the year 1900, and approved by Congress on March 1, 1901 (31 Stat. L. 861). This Act prohibited the enrollment of any citizen after the ratifica-

tion of said agreement; and the agreement was ratified by the Creek Tribe on May 25, 1901. The only portions of this Agreement, which we believe it is necessary to consider in this case, are as follows:

> "*Sec. 3.* All lands of said (Creek) tribe, except as herein provided, shall be allotted among the citizens of the tribe by said Commission so as to give each an equal share of the whole in value, as nearly as may be, in manner following: There shall be allotted to each citizen one hundred and sixty acres of land—boundaries to conform to the Government survey—which may be selected by him so as to include improvements which belong to him. One hundred and sixty acres of land, valued at six dollars and fifty cents per acre, shall constitute the standard value of an allotment, and shall be the measure for the equalization of values; and any allottee receiving lands of less than such standard value may, at any time, select other lands which at their appraised value are sufficient to make his allotment equal in value to the standard so fixed.
>
> "*Sec. 28.* No person, except as herein provided, shall be added to the rolls of citizenship of said Tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under Section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, 'An Act for the Protection of the People of the Indian Territory, and for Other Purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of de-

scent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and shall be allotted and distributed to them accordingly.

"The rolls so made by said Commission when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

This Act, known as the "Original Creek Agreement," contained the following provisions: *(1)* It changed the prior Act of April 28, 1898, in that allotments under this latter Act, vested in the allottees the fee to the lands allotted to them, and not merely a right to the use of the surface of the lands. *(2)* A citizen to be entitled to enrollment and allotment, must have been born on or before July 1, 1900. *(3)* The heirs of deceased citizens to whom allotments were to be made under the terms of the Act were to be determined by the laws of the Creek Nation, and the allotments were to be made to the heirs in accordance with those laws. *(4)* Oil and gas leases could still only be *made* by the Secretary of the Interior.

It will be particularly noted, that, by this Act, neither children who were born after July 1, 1900, nor, if deceased, their heirs, were entitled to an allotment; that, therefore, neither Andrew J. Berryhill, whose birth occurred on May 6, 1901, nor his heirs, could have any rights under this Act.

In the Indian Appropriation Act, approved May 27,

1902 (32 Stat. L. 245), Congress provided for the enrollment of Creek Indian children born subsequent to July 1, 1900. The part of that Act necessary to be considered is as follows:

> "*Provided further*, that all citizens born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, 1901, and then living, shall be added to the rolls of citizenship of said Nation made under the provisions of an Act entitled, 'An Act to Ratify and Confirm an Agreement With the Muskogee, or Creek, Tribe of Indians, and for Other Purposes,' approved March 1, 1901, and if any such child has died since the 25th day of May, 1901, or may hereafter die, before receiving his allotment of land and distributive share of the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them accordingly; and, *provided further*, that the Act entitled, 'An Act to Ratify and Confirm an Agreement With the Muskogee, or Creek, Tribe of Indians, and for Other Purposes,' approved March 1, 1901, insofar as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed, and the descent and distribution of lands and moneys provided for in said Act shall be in accordance with the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas in force in the Indian Territory."

This Act changed the Original Creek Agreement in the following respects: *(1)* It authorized the enrollment and allotment of Creek children born up to and including May 25, 1901, thus extending the time from July 1, 1900. *(2)* It further provided that where any such child died since May 25, 1901, without being enrolled and receiving his allotment, an allotment should be made to the heirs of such child; and who the heirs were should be determined by the laws of the State of Arkansas, in force in the Indian Territory.

A short time thereafter, the Commission to the Five Civilized Tribes negotiated a Supplemental Agreement with the Creek Tribe of Indians; which agreement was approved by Act of Congress of June 30, 1902 (32 Stat. L. 500), was ratified by the Creek Tribe of July 26, 1902, and went into force and effect by the proclamation of the President on August 8, 1902. This agreement we know as the "Supplemental Creek Agreement," and the Act of Congress approving it is entitled, "An Act to Ratify and Confirm a Supplemental Agreement With the Creek Tribe of Indians, and for Other Purposes." The portions of this agreement which are important to a decision of the questions involved in this case are as follows:

"*Descent and Distribution.*

"*6.* The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L. 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said Act, shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; *Provided*, That only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; and, *provided further*, That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49.

"*Rolls of Citizenship.*

"*7.* All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may

hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly.

"*8.* All children, who have not heretofore been listed for enrollment, May 25, 1901, born to citizens whose names appear upon the authenticated rolls of 1890, or upon the authenticated rolls of 1895, and entitled to enrollment as provided by the Act of Congress approved March 1, 1901 (31 Stat. L. 861), shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly.

"*16.* Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken, or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable and inalienable, and free from any incumbrance whatever, for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

" * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

"*17.* Section 37 of the agreement ratified by said Act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

"'Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes and for a period longer than five years for agricultural purposes, *and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise.* Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void, and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity. * * *'

"*20.* This agreement is intended to modify and supplement the agreement ratified by said Act of Congress approved March 1, 1901, and shall be held to repeal any provision in that agreement or in any prior agreement, treaty or law in conflict herewith."

We would call this Honorable Court's attention to the following matters set forth by this Supplemental Creek Agreement: *(1)* Where a Creek child entitled to enrollment, living May 25, 1901, thereafter dies without receiving his allotment, the allotment to which he would have been entitled was to be made to his heirs; and the personnel of the heirs was to be determined by the laws of the State of Arkansas. *(2)* Lands in the Creek Nation were to be inalienable until the 8th day of August, 1907: five years from the date of the ratification of this Supplemental Agreement. *(3)* Oil and gas mining leases on lands in the Creek Nation, could be *made by the Creek allottees with the approval of the Secretary of the Interior, instead of being made by the Secretary of the Interior, as was provided for under the Act approved April 28, 1898.*

It was under the terms of this Supplemental Agreement, proclaimed August 8, 1902, that the lands in contro-

versy were allotted and patented by the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, deceased," without naming the heirs.

Andrew J. Berryhill died about nine months before the Act went into force and effect; so that at no time during his life did he have any right whatever to enrollment as a Creek citizen, or have any right to an allotment of land in the Creek Nation. The inception of the right was therefore necessarily in his heirs.

The father of said Andrew J. Berryhill is George Franklin Berryhill, who appears as the intervenor in this suit. He is a duly enrolled citizen by blood and member of the Creek tribe of less than the full blood, and his name appears on the approved Creek Indian roll as a mixed blood Creek Indian. The mother of the said Andrew J. Berryhill is Clementine Berryhill, who is now living, but who is not a citizen of the Creek nation, and so not entitled to enrollment, nor to participate in an allotment in the Creek Nation. Andrew J. Berryhill left no issue, nor brothers nor sisters surviving him. He left surviving him his father and mother, the said George Franklin Berryhill and Clementine Berryhill, and seven paternal uncles and aunts, brothers and sisters of George Franklin Berryhill, to-wit: Martha E. Lee Kiefer, Stanford Berryhill, Columbus Berryhill, Theodore Berryhill, William Berryhill, Mary Kiefer and Josie Morton.

On the 9th day of October, 1902, about one year after his death, the name of the said Andrew J. Berryhill was placed upon the Creek Indian roll made by the Commission to the Five Civilized Tribes, under the provisions of the above quoted Section 7 of the Supplemental Agreement ratified August 8, 1902. On the 10th day of October, 1904, a deed or patent was executed by the Principal Chief of the Creek Nation, conveying the lands in controversy, together with other lands, in all, 120 acres, to the "heirs of Andrew

J. Berryhill, deceased." This patent was approved by the Secretary of the Interior on October 31, 1904, and is shown in the record as "Exhibit F" to the agreed statement of facts. (Printed Transcript, p. 212.) Also, on the same date, a homestead deed, or patent, was executed and approved conveying to the "Heirs of Andrew J. Berryhill, deceased," forty acres of land as a homestead. This patent is shown in the record by "Exhibit E" to the agreed statement of facts. (Printed Transcript, p. 211.)

Thereafter, and on March 24, 1906, the said George Franklin Berryhill, joining with him his wife, Clementine Berryhill, for a valuable consideration, executed to the appellant, Albert W. Shulthis, the oil and gas mining lease under which he asserts his rights in this suit.

It will be noted that, under the provisions of the Supplemental Creek Agreement, last above quoted, and proclaimed August 8, 1902, oil and gas mining leases could be made only with the approval of the Secretary of the Interior. On March 21, 1903, under the power and authority given the Secretary of the Interior, the first set of rules and regulations governing the leasing of lands in the Creek Nation for oil and gas mining purposes were promulgated, and these rules and regulations, with slight changes, were thereafter, at different times, reissued by the Secretary of the Interior. All oil and gas mining leases to receive the approval of the Secretary of the Interior were required to conform to these rules and regulations; and on page 310, *et sequiter*, of the record, are shown the rules and regulations governing the leasing of lands in the Creek Nation, pursuant to which the lease of George Franklin Berryhill to this appellant was made.

Sections 5 and 16 of these rules and regulations are as follows:

> "*Sec. 5.* No lease will be approved for a greater term of years than as follows: Three years for graz-

ing purposes, ten years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, one to be delivered to the lessee, and one to the lessor.

"*Sec. 16.* * * * All leases which require the approval of the Secretary of the Interior must be submitted to the Indian Agent, Union Agency, for transmittal within 30 days from and after the date of the execution of the lease, and all leases which have been heretofore executed must be submitted to said agent within 30 days from the date of the approval of this amendment. No lease presented after the time herein designated will be received by the agent or transmitted to the Department, or regarded as having any effect whatever."

Pursuant to these regulations, the lease from George Franklin Berryhill to this appellant, executed March 24, 1906, was executed in four parts, and all four parts were within 30 days, and on April 21, 1906, filed with and submitted to the Indian Agent at Union Agency, Muskogee, to be by him forwarded to the Secretary of the Interior for approval. The lease was approved by the Assistant Secretary of the Interior on April 22, 1907. This appellant also filed a bond to accompany said lease on the form prescribed by the Secretary of the Interior, which said bond was duly approved May 19, 1907. On May 13, 1907, this appellant paid into the hands of the Indian Agent at Muskogee the advance royalty provided in said lease, which payment was duly accepted.

After the approval of the lease, in accordance with the rules and regulations of the Secretary of the Interior, one part of the approved lease was filed in the office of the Commissioner of Indian Affairs, one part with the Indian Agent, Union Agency, Muskogee; one part was delivered to the

lessor, and one part was delivered to this appellant, the lessee. Immediately thereafter, and on May 18, 1907, this appellant filed his part of the lease for record in the office of the Clerk of the United States Court, and ex-officio recorder for the then existing Western District of the Indian Territory, at Sapulpa, and it was duly recorded in the records of that office.

On April 26, 1906, an Act of Congress (36 Stat. L. 145), was passed affecting the lands of all the Five Civilized Tribes, providing for the recording of leases on restricted lands, and removing the restrictions on the alienation of some of the lands. Section 20 of that Act is as follows:

> "That after the approval of this Act, all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes shall be in writing and subject to approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval: *Provided*, that allotments of minors and incompetents may be rented or leased under order of the proper court. *Provided further, That all leases entered into for a period of more than one year, shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory*".

Section 22 of the same Act removing the restrictions on alienation from certain lands inherited from deceased allottees is as follows:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, *may sell and convey the lands inherited from such decedent.* * * *"

Thereafter, and subsequent to the execution of this ap-

pellant's lease and the filing of all four parts of the lease with the Indian Agent and Union Agency, as required by the rules and regulations of the Secretary of the Interior and the Act of Congress, pursuant to which said rules were made, and on June 5, 1906, the said George Franklin Berryhill and Clementine Berryhill, his wife, executed a deed to the appellees, Edmond McKay and Perry McKay, covering the lands in controversy, and 30 acres more, for the consideration of $2,000.00.

On October 12, 1906, the said McKays, for a consideration of $800.00, executed an oil and gas mining lease to one A. B. Reese, covering the lands in controversy.

Thereafter, through a series of assignments of undivided interests in said lease, the defendant, Kiefer Oil and Gas Company, became the holder of said lease. These assignments were executed at various times between October 17, 1906, and June 26, 1907, and were all recorded in the office of the Clerk of the United States Court and ex-officio Recorder for the then existing Western District of the Indian Territory at Sapulpa.

In the month of April, 1907, the appellee, Kiefer Oil and Gas Company, entered upon the lands in controversy, began developing the same for oil and gas, and had taken and were taking large quantities of oil therefrom at the time of the commencement of this suit.

In the month of August, 1907, and subsequent to the 8th day thereof, the appellee, D. A. McDougal, procured deeds covering the lands in controversy from the above named paternal uncles and aunts of the said Andrew J. Berryhill, deceased, and from Airy Ann Berryhill, the paternal grandmother of the deceased.

Thereafter, and on October 31, 1907, the appellee, D. A. McDougal, claiming to own a remainder in fee in the lands in controversy, after a life estate in George Franklin Ber-

ryhill, executed to the appellee, Kiefer Oil and Gas Company, an oil and gas mining lease covering said land, said lease reserving to the lessor a royalty of 20 per cent.

Subsequent to the commencement of this suit, the appellant, George Franklin Berryhill, whom we will call the intervenor, filed his bill of intervention herein, praying that he be decreed to be the owner in fee of said lands, for the reason that his deed to the appellees, McKays, executed June 5, 1906, was void, and that he take said lands free and discharged of any adverse claims of the appellees, and subject only to the oil and gas mining lease to the appellant, Albert W. Shulthis.

The Circuit Court for the Eastern District of the State of Oklahoma dismissed the bill of complaint and the bill of intervention, and entered a decree herein in favor of the appellees, holding that the deed executed by the intervenor to the appellees, McKays, on June 5, 1906, conveyed to the McKays an estate in the lands in controversy for the life of the said intervenor; that the remainder in fee after the life estate was vested in the appellee, D. A. McDougal, under his deeds from the paternal uncles and aunts of the said Andrew J. Berryhill, deceased; and that the oil and gas mining lease to this appellant, Albert W. Shulthis, was void.

Thereafter, this appellant and the intervenor perfected their appeals to the Honorable Circuit Court of Appeals for the Eighth Circuit. The Circuit Court of Appeals affirmed the order of the Circuit Court, dismissing the bill of complaint and the bill of intervention, and held that the appellees, Perry McKay and Edmond McKay, were the owners in fee of the lands in controversy under their deed to them executed June 5, 1906, by the intervenor, George Franklin Berryhill; that the appellee, D. A. McDougal, acquired no interest in the lands under his deeds from the paternal uncles and aunts of the said Andrew J. Berryhill, deceased; that the deed executed June 5, 1906, by the inter-

venor, George Franklin Berryhill, to the appellees, Perry McKay and Edmond McKay, was delivered to and received by the McKays, and the consideration therefor paid by them without notice of the prior lease to this appellant, Albert W. Shulthis. That, therefore, the deed to the appellees, McKays, and the oil and gas mining lease of the appellee, Kiefer Oil and Gas Company, were superior in operation and effect to the oil and gas lease of this appellant.

Contentions *of the* Parties

The appellees, Kiefer Oil and Gas Company, D. A. McDougal, Edmond McKay and Perry McKay, contend that, under the laws of descent to be considered, viz., the laws of the State of Arkansas, George Franklin Berryhill, the lessor of the appellant, Albert W. Shulthis, and the father of Andrew J. Berryhill, deceased, acquired but an estate for his life in the lands in controversy; that the remainder in fee was vested in the paternal uncles and aunts of Andrew J. Berryhill, deceased, who are the grantors of the appellee, D. A. McDougal; that the lessor of this appellant being but a life tenant, the oil and gas mining lease to this appellant is void. Further, that even if George Franklin Berryhill, the lessor of this appellant, was seized in fee of the lands in controversy at the time of the execution of the oil and gas mining lease to this appellant, still his lease is inoperative, for the reason that the appellees, the McKays, and the appellee, Kiefer Oil and Gas Company, were purchasers in good faith without notice of the said lease to this appellant.

The intervenor, George Franklin Berryhill, contends that at the time of the alleged sale of the lands in controversy to the McKays, on, to-wit, June 5, 1906, the lands were still subject to restrictions against alienation, and were not "inherited lands," and were therefore not relieved of the restrictions against alienation by virtue of the pro-

visions of Section 22 of the Act of Congress approved April 26, 1906. (36 Stat. L. 145.)

The contentions of this appellant, Albert W. Shulthis, are, that under the patent issued by the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, Deceased," George Franklin Berryhill, as the heir nearest in the line of succession, acquired an absolute estate in fee simple in the lands in controversy. That the contention of the intervenor is well taken. But that even it be held that the lands were alienable on June 5, 1906, the date of the deed to the McKays, still the lands being inalienable at the time of the execution of the lease to this appellant, and this appellant having in good faith taken said lease in accordance with the rules and regulations promulgated by the Secretary of the Interior under the authority of the Supplemental Creek Agreement (32 Stat. L. 500), and having complied with all of said rules and regulations and obtained the approval of the Secretary of the Interior to said lease, it is in all respects valid and is prior in operation and effect to the deed to the McKays, and prior in operation and effect to the lease under which the appellee, Kiefer Oil and Gas Company, claims.

It is admitted that Clementine Berryhill, the mother of Andrew J. Berryhill, is excluded from any interest in the premises by reason of not being a citizen of the Creek Nation.

ASSIGNMENT *of* ERRORS

Now, on this 25th day of October, A. D., 1909, comes the appellant, Albert W. Shulthis, by his solicitors, C. L. Thomas and Edgar A. de Meules, and says that the order and decree entered in the above cause on the 3rd day of June, A. D., 1909, is erroneous and unjust, and files the following assignments of errors, upon which he will rely upon his prosecution of his appeal from the order and decree made by this Honorable Court on the said 3rd day of June, A. D., 1909, in the above entitled cause:

First

The United States Circuit Court of Appeals for the Eighth Judicial Circuit erred in dismissing the bill of complaint filed by the appellant, Albert W. Shulthis.

Second

The Court erred in not entering a decree in this cause adjudging the rights and liabilities of all parties as prayed in the bill of complaint filed by the said Albert W. Shulthis.

Third

The Court erred in failing and refusing to hold and adjudge the complainant to have by virtue of the lease executed and delivered to him by George Franklin Berryhill on March 24, 1906, as shown by the record, the sole and exclusive right as lessee to all and singular the oil and natural gas deposits in and under the tract of land in controversy, with the right to prospect for, extract, pipe, store, refine and remove such oil and natural gas, and to use so much of the surface of said land as may be reasonably necessary to carry on the working, prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, in-

cluding, also, the right to obtain from wells, or otherwise, a sufficient supply of water to carry on said operations, and including still further the right to use such oil and natural gas for fuel so far as is necessary to the prosecution of said operations, and, generally, to have all things secured to him under and by virtue of said lease.

Fourth

The Court erred in not holding and adjudging that the appellees, and each of them, have no interest, estate or property in or to the deposits of oil and gas in and under the lands in controversy.

Fifth

The Court erred in failing and refusing to enjoin and restrain the defendants, and each of them, from prospecting upon or drilling the lands in controversy for oil or natural gas, or from extracting any oil or gas from said lands, and from asserting any interest in or to said lands adverse and hostile to the interest and title of the complainant, Albert W. Shulthis.

Sixth

The Court erred in failing and refusing to hold and adjudge the oil and gas mining lease executed and delivered on the 24th day of March, 1906, by George Franklin Berryhill and Clementine Berryhill, lessors, and Albert W. Shulthis, lessee, covering the lands in controversy, to be superior and prior in its operation and effect to the oil and gas mining lease executed and delivered on the 12th day of October, 1906, by Edmond McKay, Perry McKay, Florence McKay and Gusta McKay, lessors, and Arthur B. Reese, lessee.

Seventh

The Court erred in failing and refusing to hold and adjudge the oil and gas mining leases executed and delivered

on the 24th day of March, A. D., 1906, by George Franklin Berryhill to appellant, Albert W. Shulthis, covering the lands in controversy, to be superior to and prior in its operation and effect to the warranty deed covering the lands in controversy, executed and delivered by George Franklin Berryhill to appellees, Perry McKay and Edmond McKay, on the 5th day of June, A. D., 1906.

Eighth

The Court erred in holding and adjudging the warranty deed to the lands in controversy executed and delivered to appellees, Perry McKay and Franklin McKay, on the 5th day of June, A. D., 1906, by George Franklin Berryhill, to be superior and prior in its operation and effect to the oil and gas mining lease executed and delivered on the 24th day of March, A. D., 1906, by George Franklin Berryhill to appellant, Albert W. Shulthis, covering the lands in controversy.

Ninth

The Court erred in holding and adjudging that the oil and gas mining lease executed and delivered by George Franklin Berryhill to appellant, Albert W. Shulthis, on March 24th, 1906, approved by the Secretary of the Interior on April 21, 1907, covering the lands in controversy, was subject to the registration laws of Arkansas, being Chapter 27 of Mansfield's Digest of the Laws of Arkansas, put in force in the Indian Territory by Act of Congress of February 19, 1903 (32 Stat. at Large 841).

Tenth

The Court erred in holding and adjudging that the appellees, Edmond McKay and Perry McKay, did not take the title to the land in controversy by virtue of the warranty deed executed and delivered to them by George Franklin Berryhill on the 5th day of June, A. D., 1906, subject to

the oil and gas mining lease executed and delivered to Albert W. Shulthis, the appellant, by George Franklin Berryhill on the 24th day of March, A. D., 1906.

Eleventh

The Court erred in ordering and adjudging that the costs of this suit be taxed against the appellant, Albert W. Shulthis.

Wherefore, the appellant, Albert W. Shulthis, prays that the said order and decree entered in the above entitled cause on the 3rd day of June, A. D., 1909, be reversed, and that the Supreme Court of the United States render a proper decree on the record.

C. L. Thomas,

Edgar A. de Meules,

Solicitors for Appellant, Albert W. Shulthis.

SPECIFICATIONS *of* ERROR

and

Propositions Relied on by Appellant Albert W. Shulthis to Support His Assignments of Error.

This appellant, in his assignment of errors (printed Record, pp. 361), assigns eleven separate errors, and respectfully insists upon each one of them. The errors assigned, however, cannot be presented separately, and the following propositions present the contentions of this appellant and fully cover the assignments of error herein. To some extent, these propositions accord with the decision of the Honorable Circuit Court of Appeals as announced in its opinion. But we apprehend that the correctness of this decision will, to some extent, be questioned by the appellees, and we offer the following syllabus as presenting fully the points to be presented by this appellant.

First Proposition

George Franklin Berryhill, the father of Andrew J. Berryhill, deceased, is the heir nearest in the line of succession to Andrew J. Berryhill, under the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, and as such heir acquired title in fee simple to the lands in controversy, under the patent issued by the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, Deceased." (Assignments of Error, Nos. 1, 2, 4, 5.)

(A) The lands in controversy were allotted and conveyed by the United States and the Creek Nation directly to the "Heirs of Andrew J. Berryhill, deceased," and the heir, George Franklin Berryhill, therefore acquired title thereto by purchase, and not by descent.

(B) George Franklin Berryhill, as the father of Andrew J. Berryhill, and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired under the laws of descent of the State of Arkansas an estate in fee simple in the lands in controversy.

(C) If it be held that the lands in controversy should be considered as having come to the "Heirs of Andrew J. Berryhill" by descent, and not by purchase, then they should be held to be an "ancestral estate" in the heirs under the provisions of the laws of the State of Arkansas, and title in fee simple thereby vested in the father, George Franklin Berryhill.

Second Proposition

The Honorable Circuit Court of Appeals erred in not holding that the appellees, Kiefer Oil and Gas Company, D. A. McDougal, Edmond McKay and Perry McKay, received the various leases and deeds under which they claim, subject to all of the rights and interests of the appellant, Albert W. Shulthis, acquired under the oil and gas mining lease executed to him by the intervenor, George Franklin Berryhill. (Assignments of Error, Nos. 6, 7, 8, 9, 10.)

(A) The Act of Congress approved February 19, 1903 (32 Stat. L. p. 841), entitled, "An Act Providing for the Record of Deeds and Other Conveyances and Instruments of Writing in Indian Territory, and for Other Purposes," had no application to mineral leases covering lands from which the restrictions against alienation had not been removed, and such leases executed in accordance with the rules and regulations promulgated by the Secretary of the Interior under the authority of the "Supplemental Creek Agreement" (32 Stat. L. 500), and approved by the Secretary of the Interior, were not within the purview of that Act.

(B) Irrespective of the foregoing proposition "A," the appellees, Kiefer Oil and Gas Company and Edmond

McKay and Perry McKay, are charged with notice of the existence of the oil and gas mining lease to this appellant, and under the facts disclosed by the evidence, cannot be held to be *bona fide* purchasers without notice of this appellant's lease.

Third Proposition

The lands in controversy having been conveyed by the patent from the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, deceased," were not "inherited lands" under Section 22 of the Act of Congress of April 26, 1906 (36 Stat. L. 145). Therefore, the restrictions against the alienation of the lands, imposed by the provisions of the Supplemental Creek Agreement (32 Stat. L. 500) were not removed at the time of the execution of the warranty deed to the appellees, Edmond McKay and Perry McKay, and, therefore, the deed and the lease under which the appellees, the McKays and the Kiefer Oil and Gas Company, claim are void. (Assignment of Errors, No. 4.)

ARGUMENT

FIRST PROPOSITION

George Franklin Berryhill, the father of Andrew J. Berryhill, deceased, is the heir nearest in the line of succession to Andrew J. Berryhill, under the provisions of Chapter Forty-nine of Mansfield's Digest of the Statutes of Arkansas, and as such heir acquired title in fee simple to the lands in controversy under the patent issued by the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, Deceased."

To present this first proposition, this appellant has divided his argument for convenience into sub-divisions A, B and C.

(A) The lands in controversy were allotted and conveyed by the United States and the Creek Nation, directly to the "Heirs of Andrew J. Berryhill, Deceased:" and the heir, George Franklin Berryhill, therefore acquired title to said lands by purchase and not by descent.

It is important in this discussion that the date of the birth and the date of the death of Andrew J. Berryhill be kept well in mind. He was born on the 6th day of May, 1901, and died in the month of November, 1901, making him about six months old at the time of his death. Under the Acts of Congress, and under the treaties or agreements entered into by the United States and the Creek Nation, he was at no time during his life entitled to enrollment as a citizen of the Creek Nation, *and at no time did he ever have the least vestige of any right, title or interest in or to any of the lands of the Creek Nation.* These facts are not controverted.

The Act of Congress approved June 28, 1898 (30 Stat. L., 495), and known as the "Original Curtis Act," provided

for the enrollment of citizens of the various tribes in this wise:

> "*Section 21.* * * * Said (Dawes) Commission is authorized and directed to make correct rolls of the citizens by blood of all the other tribes, eliminating from the tribal rolls such names as may have been placed thereon by fraud or without authority of law, enrolling such only as may have lawful right thereto, and their descendants born since such rolls were made. * * *
>
> "The rolls so made, when approved by the Secretary of the Interior, shall be final, and the persons whose names are found thereon, with their descendants thereafter born to them, with such persons as may intermarry according to tribal laws, shall alone constitute the several tribes which they represent."

Many enrollments and allotments were made under this Act.

In the year 1900, the Dawes Commission and the representatives of the Creek Nation negotiated an agreement providing for the enrollment of the citizens, and the allotment of the lands of the Creek Nation. This agreement was amended by Congress, and as amended was passed, and was approved March 1, 1901. It was ratified by the Creek Nation in the month of June, 1901. This agreement we know as the "Original Creek Agreement" (31 Stat. L. 861).

Section 28 of this latter Act providing further for the enrollment of citizens of the Creek Nation, is as follows:

> "*Section 28.* No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> "All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under Section twenty-one of the Act of Con

gress approved June twenty-eight, eighteen hundred and ninety-eight, shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving the allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs, according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens so entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and money to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of lands and the distribution of all moneys and other property of the tribe shall be made, and to no other person."

The third paragraph of this section marks the time within which Creek Indians must be born to be entitled to enrollment and allotment under this treaty, to-wit, July 1, 1900.

If a child of Creek parentage was so unfortunate as to be born on July 2, 1900, he would not, under this Act, be entitled to share in the lands of the Creek Nation. It will further be noticed that by this section the Creek law furnishes the rule in determining who are entitled to take allotments as heirs. This section remained in force and effect until May 27, 1902, when there was incorporated in an Indian Appropriation Bill a provision extending further the

right of enrollment and allotment, and including other persons not included in the provisions of the "Original Creek Agreement." This section, heretofore quoted, is as follows (32 Stat. L., 245):

> "*Provided further*, that all children born to duly enrolled and recognized citizens of the Creek Nation, *up to and including the twenty-fifth day of May, nineteen hundred one*, and then living, shall be added to the rolls of citizenship of said Nation made under the provisions of an Act entitled 'An Act to Ratify and Confirm an Agreement With the Muskogee or Creek Tribe of Indians, and for Other Purposes,' approved March first, nineteen hundred one, and if any such child *has died since the twenty-fifth day of May, nineteen hundred and one*, or may hereafter die before receiving his allotment of land and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them accordingly; and, *Provided further*, that the Act entitled, 'And Act to Ratify and Confirm an Agreement With the Muskogee, or Creek, Tribe of Indians, and for Other Purposes,' approved March first, nineteen hundred and one, in so far as it provides for descent and distribution of lands and moneys provided for in said Act, shall be in accordance with the provisions of Chapter forty-nine of Mansfield's Digest of the Statutes of Arkansas, in force in the Indian Territory."

By joint resolution of both houses of Congress, the operation of this Act was postponed until July first, 1902 (32 Stat. L., 742). On this latter date the agreement between the United States and the Creek Nation, known as the "Supplemental Creek Agreement" (32 Stat. L., 500), was approved by the President, was ratified by the Creek Nation July 26, 1902, and was proclaimed by the President August 8, 1902.

The provisions of the section last above quoted were

incorporated in this "Supplemental Creek Agreement," in words as follows:

> "*Sec. 6.* The provisions of the Act of Congress, approved March first, 1901, insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; *Provided,* That only citizens of the Creek Nation, male and female, and their Creek descendants shall inherit lands of the Creek Nation; and, *Provided further,* That if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter."
>
> "*Sec. 7.* All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901, subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly."

It was under this Section seven that the name of Andrew J. Berryhill, then deceased, was placed on the roll of Creek citizens, and the allotment made to his heirs. That Act, at the same time, says who the heirs shall be so far as this piece of property is concerned. A standard allotment in the Creek Nation consists of 160 acres of land; and the Act says in substance: "There shall be given and allotted to the heirs of Andrew J. Berryhill, 160 acres of land; the heirs to be determined by the law of the State of Arkansas, and the heirs shall select their own allotment."

Andrew J. Berryhill died in November, 1901, and in October, 1902, George Franklin Berryhill, the father, as the heir of Andrew J. Berryhill, had the name of his deceased son placed on the approved Creek roll, filed on the land in controversy in April, 1904, and in October, 1904, three years after the death of Andrew J. Berryhill, a deed was executed wherein it was recited that, "*Whereas,* There has been allotted to the heirs of Andrew J. Berryhill, a deceased Creek Indian," etc., there is hereby "granted and conveyed unto the heirs of Andrew J. Berryhill, a deceased Creek Indian," the lands in controversy (Printed Transcript, p. 212).

Under the last quoted section, and under the deed or patent to the heirs, the heir, as allottee, takes his title by purchase directly from the United States and the Creek Nation. This proposition cannot be seriously controverted.

A close analogy is found in the decisions of the State and Federal Courts interpreting the Homestead Laws of the United States. In *Towner* v. *Rodegeb,* 74 Pacific Reporter, 50, the Supreme Court of Washington held that the heirs of the entryman did not acquire their rights from their ancestor by succession, but because the law gave them preference as new homesteaders.

Accord—

Gould v. *Tucker* (S. D.), 100 N. W. Rep., 427; 105 N. W. Rep., 624;
McCune v. *Essig,* 122 Fed. Rep., 588;
Marley v. *Sturkert* (Neb.), 86 N. W. Rep., 1056;
Gjerstadengen v. *Van Duzen* (N. D.), 76 Rep., 521.

So in the case at bar, the heirs acquired the estate, not by succession, but in their own right, as allottees, the right being given them by statute, subsequent to the death of the ancestor, *and the land in the hands of the heirs is a pure donation from the United States and the Creek Nation.*

In the case of *Warnell* v. *Finch,* 15 Tex., 163, the Supreme Court of Texas had before it a question almost

identical with the one under consideration. There the court had for interpretation an Act of the Republic of Texas, entitled, "An Act for the Relief of the Heirs of Those Who Fell With Fanning, Ward, Grant and Johnson During the War With Mexico in the Years 1835 and 1836." The patent to the lands in question was issued in 1841. "To the heirs of Henry Warnell." The laws in force at the time title passed contained an inhibition against alien heirs holding real estate coming by descent, and Henry Warnell left surviving him one heir, and that heir was an alien. The Court, in its opinion, said:

> "How, then, does the heir hold in the case before us? Not from his ancestor, but he is the immediate grantee of the Government. His ancestor had no right or title to descend to him. The Government grants the land to the alien heir directly."

So in the case at bar, the deceased, Andrew J. Berryhill, having at no time any right or title to descend, his heir takes directly from the United States and the Creek Nation as an allottee.

It is a fundamental and elementary proposition in the law of real property that there are but two modes of acquiring title to real estate, namely, "by descent" and "by purchase." The one absolutely necessary prerequisite to title by descent is that the ancestor must be seized of the estate at the time of his death.

Blackstone sets forth the principles in this wise:

> "We must also remember, that no person can be properly such an ancestor, as that an inheritance of lands or tenements can be derived from him, unless he hath had actual seizin of such lands, either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from the lessee of the freehold; or unless he hath had what is equivalent to corporal seizin in hereditaments that are incorporeal;

* * * But he shall not be accounted an ancestor, who hath had only a bare right or title to enter or be otherwise seized. And therefore all the cases which will be mentioned in the present chapter, are upon the supposition that the deceased (whose inheritance is now claimed) was the last person actually seized thereof."

II. Blackstone Com., p. 209.

And, again: Purchase is thus defined by Littleton: "the possession of lands and tenements, which a man had by his act or agreement, and not by descent from any of his ancestors or kindred. In this sense it is contradistinguished from acquisition by right of blood and includes every other method of coming to an estate, but merely by inheritance, wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law."

Bl. Com. Vol. II. p., 240

The distinction is lucidly expressed in 1 Preston's Estates 36 (Underhill on Wills, 810):

"The expression 'words of limitation,' is always used in contradistinction to the expression 'words of purchase.' By the former expression, it must be understood that the interest limited by these words is not originally given to the heirs, but to their ancestors, either mediately or immediately or eventually, so as to create in him an estate or interest of inheritance descendible to his heirs of the given description. By the latter expression is meant such words as give the estate limited by the term 'to the heirs' originally in their own right and the person answering that description, and not through the medium of, or by descent from any ancestor, in whom the estate to pass by the limitation to the heirs cannot vest in any possible event. A consequence is that the power of alienation commences in the heirs and not in the ancestor; and the heirs, unless their interest shall be defeated under the rules applicable to contingent remainders, will not be liable to the charges or bound by the conveyance of the person who

in point of fact and in reference to other property may be their ancestors."

And again, in Washburn on Real Property, Vol. III., p. 4, the principle is laid down in these words:

> "In one thing all writers agree, and that is in considering that there are two modes only, regarded as classes, of acquiring a title to land; namely, descent and purchase; purchase including every mode of acquisition known to the law, except that by which an heir, on the death of an ancestor, becomes substituted in his place as owner by the act of the law."

The appellees admit that this contention is correct, but assert that it is only technically correct, and contend that even if the lands in controversy do come to the heirs by purchase, that, nevertheless, the use of the words "descend to the heirs," found in Section 7, of the Act of Congress last above quoted, will justify the Court in considering the lands as having vested in the ancestor, Andrew J. Berryhill, during his lifetime; in other words, that the word "descend" shows an intention on the part of Congress that the case be considered as one of title by descent and not by purchase.

We assert with confidence that such contention is not borne out by reason nor by authority. The word "descend" has a well-defined meaning in the common law and in our statute law. The essentials for a title by descent must exist for lands to descend; and when the word "descend" is used in a statute where it is not technically applicable, the courts will not shape the statute to fit the word, but will give to the word a non-technical meaning, as "to go to," "to go down," "to vest in," "to pass," "to inure," etc.

Tate v. *Townsend*, 16 Miss., 316-319;
Johnson v. *Norton*, 10 Pa. St., 245;
Borgner v. *Brown* (Ind.), 33 N. E. Rep., 92;

Doren v. *Gilum* (Ind.), 35 N. E. Rep., 1101;
Brooks v. *Kip* (N. J.), 35 Atl. Rep., 658-660;
Ballentine v. *Wood* (N. J.), 9 Atl. Rep., 582-585;
Aydlett v. *Swope* (Tenn.), 17 S. W. Rep., 208;
Halstead v. *Hall*, 60 Md., 209;
Barclay v. *Cameron*, 25 Tex., 242;
Stratton v. *McKinne* (Tenn.), 62 S. W. Rep., 636-640;
Meadowcroft v. *Winnebago Co.* (Ill.), 54 N. E. Rep., 949;
Starr v. *Hamilton* (U. S.), 22 Fed. Cas., 1107;
Spangenberg v. *Guiney*, 3 Ohio Dec., 163.

Further, we submit that a short analysis will plainly demonstrate the fallacy of this contention. If the lands in controversy are to be considered as having come by descent for appellees' purpose, then certainly they must be considered as having come by descent for all purposes.

Now, suppose the lands of citizens in the Creek Nation were subject to levy and sale for payment of judgments and debts, and suppose in the present case, Andrew J. Berryhill died leaving certain judgments obtained against him, or certain debts provable against his estate. Would it be contended that the lands in controversy in the hands of his heirs or his administrator, would be subject to sale for the satisfaction of the judgments or the payment of the debts? This claim has often been made where title to public lands has been patented to the heirs of one deceased, and the courts have invariably justly declined to allow the contention.

Haun v. *Martin* (Ore.), 86 Pac. Rep., 371;
Burns v. *Hamilton's Admr.*, 33 Ala., 210;
Gjerstadengen v. *Van Duzen* (N. D.), 76 N. W. Rep., 233;
De Mars v. *Hickey* (Wyo.), 80 Pac. Rep., 521.

Again, assume for the purpose of illustration, that the laws in force in the Creek Nation provide for community

property in all lands acquired by the husband or wife during coverture; and assume that Andrew J. Berryhill left a widow surviving him. Would the Court then go to the length of holding that Andrew J. Berryhill was to be considered as having died seized of the lands, and vest in the surviving widow a share of the lands as community property? The great weight of authority says no.

Webb v. *Webb*, 15 Tex., 274;
Labish v. *Hardy*, 77 Cal., 327;
Harris v. *Harris* (Cal.), 12 Pac. Rep., 274;
Gafford v. *Foster* (Tex.), 81 S. W. Rep., 63.

Again, assume for the moment that Andrew J. Berryhill left a widow surviving him. Chapter 53 of Mansfield's Digest of the Statutes of Arkansas, entitled "Dower," was a part of the laws of Arkansas effective in the Creek Nation. Under the Arkansas laws, the widow was not an heir of her husband, and acquired her statutory estate not by virtue of any of the provisions of the law of "descent and distribution," but solely by virtue of the provisions of Chapter entitled "Dower." Under the provisions of the chapter (Mansfield's Digest, Section 2751), the widow was entitled to dower in all lands "whereof her husband was seized of an estate of inheritance at any time during marriage." Could the widow then assert a dower right in the lands in controversy? We submit that a denial of the right would be inevitable.

Quinn v. *Ladd* (Ore.), 59 Pac. Rep., 457;
Farris v. *Hayes*, 9 Ore., 81;
Vance v. *Burbank*, 101 U. S., 514; 25 L. Ed., 929;
Patawa v. *United States*, 132 Fed. Rep., 893;
Braun v. *Mathieson* (Ia.), 116 N. W., 789.

In each case the courts would undoubtedly recognize that the lands came to the heirs not only technically by purchase, but would exclude all idea of title by descent.

It is the further contention of the appellees that even though the heirs in this case acquired title by purchase, yet that Congress did not recognize the destinction between land coming to "heirs" by descent, and lands coming to "heirs" by purchase. We submit that the statutes and treaties applicable to this case, and the exhibits (printed Transcript, pp. 211 and 212) in evidence in the case prove conclusively that not only is it to be presumed as a matter of law that Congress did recognize the distinction; but that as a matter of fact the distinction was recognized in Section 7, above quoted, of the Act of Congress approved June 30, 1902, and in Section 5, of the Act of Congress approved April 26, 1906 (34 Stat. L., 137). This latter section is as follows:

> "That all patents or deeds to allottees in any of the Five Civilized Tribes to be hereafter issued shall issue in name of the allottee, and if any such allottee shall die before such patent or deed become effective, the title to the lands described therein shall inure to and vest in his heirs, and in case any allottee shall die after restrictions have been removed, his property shall descend to his heirs or his lawful assigns, as if the patent or deed had issued to the allottee during his life, and all patents heretofore issued, where the allottee died before the same became effective, shall be given like effect. * * *"

The land history of the Creek Nation shows that in many instances deeds were issued in the name of the Indian citizen, when at the time the grantee was dead. In such cases it was the practice in vogue to return the deed to the office of the Principal Chief, and thereafter deeds would issue to the "heirs." In other cases no second deed was issued to the heirs, and to obviate the necessity of a second, Section 5, above quoted, was inserted in the Act of Congress approved April 26, 1906. The result of this Section is to vest in the heirs the title to the lands claimed by them,

even though patent issued after the date of the death of the Indian himself. We assert that Congress and the Creek Nation recognized no distinction and intended no distinction to be made between "allottees," and that an "allotment to the heirs" should in all respects be considered the same as an allotment made to an enrolled living individual member of the tribe.

In the present case, we must find an allottee. Andrew J. Berryhill could not qualify because at no time during his life was he entitled to enrollment or allotment, and it was about one year after his death that the Act was passed authorizing the allotment to his heirs. So that to say Andrew J. Berryhill should be considered as the allottee would be so utterly at variance with the facts as to be unwarranted. The inception of the right and title was in the heirs, who are the first takers from the United States and the Creek Nation.

It is a well known fact that nearly all, if not all, of the legislation passed affecting the country which was the Indian Territory, emanated from the Interior Department, and that such legislation as did not emanate from the Interior Department was submitted to the Department before being passed by Congress. This being true, we might with reason say that if the distinction between "lands allotted to the heirs" and "lands inherited by the heirs," was recognized by the Interior Department, that it was also recognized by Congress.

Section 17 of the Supplemental Creek Agreement, approved June 30, 1902, provides: That mineral leases may be made with the approval of the Secretary of the Interior, and not otherwise.

Almost immediately after the approval, ratification and proclamation of this treaty, the Secretary of the Interior promulgated rules and regulations to which all oil and gas mining leases and other mineral leases must conform before

they would receive his approval. This first set of rules and regulations was promulgated on this 21st day of January, 1903, and in these rules he provides for leases "of undivided inherited lands" and "of undivided allotments made directly to the heirs."

This same provision was incorporated in the amended rules and regulations promulgated by the Secretary of the Interior on July 10, 1903 (printed Transcript, p. 217, Sec. 10), and appeared without change in the rules and regulations in force at the time the lease from the intervenor to the appellant was executed. (Printed Transcript, p. 317, Sec. 10.)

The Department of the Interior has had this exact proposition before it, and on January 13, 1908, in the matter of Creek Oil and Gas Mining Lease from Melissa Wiley, a Creek citizen, to John H. Rebold, the Secretary of the Interior, in an opinion rendered the Commissioner of Indian Affairs, recognized that the heirs in a case parallel to the case at bar took title by purchase, and not by descent. The *Melissa Wiley* case involved a construction of Section 28, above quoted, of the "Original Creek Agreement," and we quote from the Secretary's opinion as follows:

> "It appears Melissa Wiley, the lessor, is the daughter of Martha Wiley, who was a citizen of the Creek Nation and who died August 16, 1899; that on the 21st day of October, 1899, an allotment was selected (presumably under the Act of Congress approved June 28, 1898), in her name, and the application for the allotment and selection was accepted by the Commission to the Five Civilized Tribes. No ratification was ever made by the Creek Nation of the provisions of the Act of June 28, 1898.
>
> "The Act of March 1, 1901, became a law May 25, 1901, by ratification of the Creek Council, the said Act being generally referred to as the first Creek Agreement. Section 28 of said Act provides that:

"'All citizens who were living on the first day of April, 1899, entitled to be enrolled under Section 21 of the Act of Congress approved June 28, 1898, entitled "An Act for the Protection of the People of the Indian Territory, and for Other Purposes," shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to the heirs according to the laws of descent and distribution of the Creek Nation and be allotted and distributed to them accordingly.

"There cannot be a grant unless there is a grantee, and consequently there cannot be a present grant unless there is a present grantee. (See case of *Hall* v. *Russell*, 101 U. S. 503.) Adhering to this principle, it must be held then that persons dying prior to May 25, 1901, who were entitled to enrollment if they were living April 1, 1899, are to be considered as units of allotment and distribution and the interest such persons would have received had they lived, passed by virtue of said Act to others.

"Martha Wiley was living on April 1, 1899. She died long before the Act of March 1, 1901, became effective. Melissa Wiley was her nearest relative and became the qualified grantee and she took the allotment (that would have been the property of Martha Wiley, had she lived), *not by virtue of inheritance, but by grant from the Creek Nation*, in accordance with the Acts of Congress referred to, which were ratified by the Creek Council. * * * "

In the case of *Hall* v. *Russell*, 101 U. S., 503, 25 L. Ed. 829, the Supreme Court of the United States had presented to it the exact question we are considering, and the decision of the Court in that case alone demonstrates the fallacy of the contention of the appellees. The complainant there

filed his bill in equity in the Circuit Court for the Eastern District of Oregon. The suit arose over an Act of Congress, approved September 27, 1850, commonly known as the "Oregon Donation Act" (9 Stat. L. 496). That Act provided for the settlement of lands in Oregon Territory; that a single man could take up 320 acres, and a married man 640 acres; that the land must be surveyed; that at the end of twelve months' occupation the settler must prove such settlement to the Surveyor General; and, that the land must be occupied and cultivated for four years, etc. That when all the provisions of the Act had been complied with, a patent should issue.

Section 8 of the Act provided:

> "That upon the death of any settler before the expiration of the four years' continued possession, all the rights of the deceased, under this act *shall descend* to the heirs-at-law of such settler, including the widow, where one is left, in equal parts, and proof of compliance with the conditions of this act up to the time of the death of such settler, shall be sufficient to entitle them to a patent."

Under this act, one Loring, a single man, in 1852, settled on the land in dispute. He lived on the land one year and died, leaving a will whereby he devised his estate to one Hall. On the death of Loring the Delays, husband and wife, claimed the land as settlers.

The heirs of Loring, the devisee Hall, and the Delays, all claimed the land. A patent was finally issued to the heirs of the Delays. The question presented was: "Whether the heirs of a settler under the Oregon Donation Act, who died before the expiration of the four years' residence and cultivation required, took *by descent* from the settler, or *as donees* of the United States. If by descent, it is conceded the settler had a devisable estate. If as donee, he had not." In other words, the question presented was: Are

the heirs to be considered as having taken by purchase or by descent?

The Circuit Court, in passing on the phrase, "shall descend to the heirs-at-law," said:

"The word, 'descent' as here used, means nothing more than pass or go" (11 Fed. Cas. 251). On appeal the Supreme Court of the United States sustained the decision of the Circuit Court, and held that the heirs did not take title by descent, but as purchasers or donees of the United States. Chief Justice WAITE, in delivering the opinion of the Court, said (101 U. S. 503, 25 L. Ed. 829):

> "For the purpose of the present suit it is enough to show that the occupant got no title himself, beyond that of a mere right of possession, until he had completed his four years' continued residence and cultivation. * * * There was no grant of the land to a settler until he had qualified himself to take as grantee by completing his four years' residence and cultivation. * * *
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> "As the law required full four years' residence by the person who claimed the grant, if no provision had been made for a continuance of his possession the land would have become vacant on his death and open for a new settlement by a new settler, if the law authorizing new settlements still remained in force. Hence, it was provided that the possessory rights of a deceased settler should *go* to his heirs, and that they might get the land on making the requisite proof, without further residence and cultivation of their own. Their title to the land was to come, not from their deceased ancestors, BUT FROM THE UNITED STATES. The title, it is true, was granted to them by reason of the possessory rights of their ancestors, but these were rights which they could not transfer, and which passed to them under the statute without any act of his. *On his death, his heirs became qualified grantees.* Whether they took immediately on his death or after proof of his compliance with the provisions of the act while in life, need not be decided. *It is enough for this case that when the ancestor*

died he had nothing in the lands which he could transmit to them, and that what they afterwards got came from the United States, and not from him. All his rights in the land were dependent on his completion of the four years' possession, but in consideration of what he had done, Congress made his heirs the special objects of its bounty, if he died before his own grant had been secured. WE ATTACH NO IMPORTANCE TO THE WORD 'DESCEND' AS USED IN THIS SECTION. IN SECTION 4 THE WORD SELECTED TO CONVEY SUBSTANTIALLY THE SAME IDEA WAS 'ENTITLED.' The thing done was to give the heirs of a settler the benefit of his rights and to designate them as recipients of the bounty of the government instead of him."

We submit that this case is exactly in point and that the contention of appellees herein is exactly the contention that was unsuccessfully made in the decided case. There it was held that the word "descend" was inapplicable, and a legislative intent could not be inferred; and the lands could not be considered as having come to the heirs by descent when they in fact came by purchase. So in the case at bar: Andrew J. Berryhill having died seized and possessed of no interest in the lands in controversy; the lands cannot be held by a process of statutory construction to have vested in the heirs by descent. The fact that the language of Section 8 of the Donation Act provided that the lands shall descend "in equal parts," does not alter the case. The one pertinent fact is that the lands *could not descend* in equal parts or otherwise, for the all sufficient reason that there was no estate "to descend."

The legislature of the Territory of Oregon, subsequent to the passage of the Oregon Donation Act, enacted a law, the purpose of which was to make the heirs, in cases similar to the case of *Hall* v. *Russell*, take by descent and not by purchase. This law was, however, declared a nullity by the Federal courts as in conflict with the Act of Congress. *Hershberger* v. *Blewett*, 55 Fed. Rep. 170.

In conclusion, therefore, we insist that Andrew J. Berryhill, not being entitled to enrollment or allotment in the Creek Nation during his lifetime, and no right existing even in his heirs until about one year after his death, the heirs took the allotment in question by purchase, and are to be considered as allottees, the direct donees and grantees of the United States and the Creek Nation, and not as heirs taking by descent from an ancestor.

(B) George Franklin Berryhill, as the father of Andrew J. Berryhill and as the heir nearest in the line of succession to Andrew J. Berryhill, acquired, under the laws of descent of the State of Arkansas, an estate in fee simple in the lands in controversy.

We submit that this proposition is the natural legal corrollary of the preceding proposition.

The Circuit Court in its opinion (printed Transcript, p. 264), holds that, once considering that George Franklin Berryhill acquired his estate in the lands by purchase, then the truth of this, our second proposition, must follow.

It is conceded that by Section 6 of the "Supplemental Creek Agreement," approved June 30, 1902, and proclaimed August 8, 1902, Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, became law in the Creek Nation. Said Section 6 is as follows:

> "The provisions of the Act of Congress, approved March 1, 1901 (31 Stat. L., 861), insofar as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas now in force in Indian Territory; *Provided*, that only citizens of the Creek Nation, male or female, and their Creek descendants, shall inherit lands of the Creek Nation; and, *provided further*, that if there be no per-

son of Creek citizenship to take the descent and distribution of said estate then the inheritance shall go to non-citizen heirs in the order named in said Chapter 49."

The next section (Section 7) is the one under which the enrollment and allotment under consideration was made. For convenience, we quote this section, which is as follows:

> "All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901 (31 Stat. L., 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be placed on the rolls made by the said Commission. And if any such child has died since May 25, 1901, or may hereafter die before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled, if living, shall descend to his heirs accordingly."

Pursuant to this section, the land in controversy was allotted to the heirs of Andrew J. Berryhill, and the patent, as shown by Exhibit "E" to the Agreed Statement of Facts (printed Transcript, p. 212), was issued to the heirs. The patent recites that the allotment was made to the heirs, and the conveyance was made to the heirs without expressly naming them. *The heirs, if more than one existed, would all take equally. The word "heirs" defines the grantees as a class; is a description of the person or persons who take under the patent; and if more than one, would take equally, regardless of the shares or proportions they would have taken had the title come to them by descent.* This proposition is abundantly supported by the authorities.

McCrea's Appeal (Pa.), 36 Atl. Rep., 412;
Auman v. *Auman*, 21 Pa. St., 348;
Leathers v. *Gray* (N. C.), 2 S. E. Rep., 455;
Ward v. *Stowe* (N. C.), 27 Am. Dec., 239;
Starnes v. *Hill*, 112 N. C., 1;

Durbin v. *Redman* (Ind.), 40 N. E. Rep., 133-134;
Wilburn v. *Wilburn*, 83 Ind., 55;
Fabens v. *Fabens* (Mass.), 5 N. E. Rep., 650;
Hobbie v. *Ogden* (Ill.), 53 N. E., Rep., 106;
Brown v. *Belmarde*, 3 Kan., 40;
Haun v. *Martin* (Ore.), 86 Pac. Rep., 371;
Walker v. *Ehresman* (Neb.), 111 N. W. Rep., 219;
Aspey v. *Barry* (S. D.), 83 N. W. Rep., 91.
Gould v. *Tucker* (S. D.), 105 N. W. Rep., 624;
Burke v. *Modern Woodmen of America* (Cal.), 84 Pac. Rep., 275;
Cooper v. *Wilder* (Cal.), 43 Pac. Rep., 590;
Wittenbrook v. *Wheadon* (Cal.), 60 Pac. Rep., 664.

In *Auman* v. *Auman*, *supra*, the Supreme Court of Pennsylvania said:

> "We do not perceive the distinction taken by counsel of the plaintiff in error between the phrase, 'their heirs' and 'heirs of them.' The legal, as well as the grammatical meaning of both is the same. The one means children or issue no more than the other. In the case cited, the word heirs was necessarily a word of purchase because neither of the ancestors took a preceding estate. *Being a word of purchase, it was by the same necessity descriptio personae,* and no one could take who did not meet the description of a right heir to both ancestors."

Under the provisions of Section 6, above quoted, we must look to the Arkansas law to determine who can qualify as an heir of Andrew J. Berryhill, and Section 1 of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas (M. D., Section 2522), points out the general line of succession, and is as follows:

> "When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed, in parcenary, to his kindred,

male and female, subject to the payment of his debts and the widow's dower, in the following manner:

"*First.* To children, or their descendants, in equal parts.

"*Second.* If their be no children, then to the father, then to the mother, then to the brothers and sisters, or their descendants, in equal parts.

"*Third.* If there be no children, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lineal ancestor, and their children and their descendants, in equal parts."

This section established the general line of succession, and is a general table of descents. It points out the heir or heirs nearest in line in any given case. Applying the rules formulated by this section to this controversy, we find that the facts in the case do not come within subdivision one—Andrew J. Berryhill left no child, nor the descendants of any child. The second subdivision places the father next in the line of succession, and, under this subdivision, George Franklin Berryhill takes the title in fee to the land in controversy as heir of his son, under the patent to the heirs issued by the United States and the Creek Nation.

The case of *Kelly's Heirs* v. *McGuire*, decided by the Supreme Court of the State of Arkansas (15 Ark., 555), is the leading case construing this section, and, in fact, construing the whole of the Arkansas law of descents and distribution. The Court, in its opinion in that case, says:

"The first section is general and comprehensive, embracing *all lands*, whether ancestral or newly acquired, *subject to certain exceptions and qualifications* hereinafter more particularly noticed, and these exceptions refer to real estate alone. * * *

"The effect of the first section, subject to the

exceptions and qualifications alluded to, is to vest an absolute estate of inheritance of lands in the person who takes."

And in making its several conclusions the Court further says:

"After carefully considering each of the provisions of the statute, and all together as a whole, we have come to the following conclusions:

"*6th.* That, when the inheritance is fixed by these facts in any given line, it will pursue that line until it becomes extinct, and the objects of bounty, and the order, in which they succeed one another, and the proportion they take, all to be ascertained by the first section, which is to be considered as the general table of descent."

Bearing in mind that this is a case of title to the heirs by purchase and not by descent, we assert that the persons standing nearest in the line of succession being once determined, the purpose of the reference to the statute is over; and the heir or heirs nearest in line take equally in their own right, regardless of the proportions they would have taken had the estate come to them by descent.

The Supreme Court of Kansas, in the case of *Brown* v. *Belmarde*, 3 Kan., 40, had before it a question similar to the one under consideration. In the course of its opinion, the Court there said:

"The record shows that he (Laventure, the member of the Indian tribe), did die in 1847. Therefore, from that time to the passage of the Act of May 26, 1860, the whole title to the lands in controversy was in the Government. That Act operated as an original grant to the persons who shall be ascertained to be meant by the word 'heirs' used therein.

"It was insisted in the argument that whoever would under the law have inherited the real estate

generally of Laventure at the time of his death, are the persons meant by the word 'heirs' in the Act of Congress. * * * But we know no rule of construction that would authorize such a conclusion.

"Assuming, as above indicated, that the Act of Congress operated as an original grant, and that the word '*heirs of deceased reservees*' are merely *descriptio personae*, the question is of comparatively easy solution."

In the case of *Ward* v. *Stowe*, decided by the Supreme Court of North Carolina (reported in 27 Am. Dec., 238), the Court lays down our exact proposition. And while the facts of that case do not admit of a close analogy to the case at bar, as there the Court had before it the construction of a will, yet the reasoning of the Court is in line with the contention of this appellant. The will in the reported case provides:

"It is my will, and I do allow, that all the remaining part of my estate, both real and personal, be equally divided amongst the heirs of my brother, John Ford, the heirs of my sister, Nancy Stowe, the heirs of my sister, Sallie Ward, and my nephew, Levi Ward."

The Court there held that the statute of descents must be looked to, to determine who should take as the heirs nearest in the line of succession. This once established, the purpose of the reference was over, and the persons thus ascertained take as tenants in common, the same as if they had been specially named in the will.

We quote from the opinion as follows:

"Here the donees do not take by descent for their ancestor had no estate which the word heirs can expand into an estate of inheritance. They do not, therefore, take as heirs, but take simply as purchasers. But it is insisted for the plaintiff that, nevertheless, they are described as 'heirs;' that the law of descents

is necessarily referred to for the understanding of that term and the ascertainment of the persons thereby intended; and, therefore, this law is to regulate, also, the shares in which the thing is given is to be enjoyed by those on whom it is bestowed. With the highest respect for those who have drawn this inference, we are compelled to say that we do not feel its force. Every voluntary disposition of property takes effect according to the agreement of the contracting parties. Their intentions, properly expressed, give the mode and the form that constitute the law of the conveyance. The regulations of the State for the transmission of inheritance, left vacant by death, do not *proprio vigore* operate on the subject matter of such conveyances and can apply to them so far as the parties have adopted them and directed them to be applied. When a technical phrase is deliberately used, it is reasonable to suppose that it is employed in the sense appropriated to it in the science or art from which it has been taken, and that science or art is very properly consulted for its interpretation.

"'Heirs' is a well known term in the law of descent, and when donees or devisees are not otherwise described than as heirs, the law is impliedly referred to for the meaning of the term. But whether these donees or devisees are to take much or little, for a long or a short time altogether, or by moieties, in equal or unequal portions, *the law of descents can give no information*, for it has made no provision in relation to these matters, but has left all these to be regulated by the law which the parties may have themselves made in their conveyance. * * * The term 'heirs' has here but a single meaning, and can produce, as we think, but a single effect. It is not pretended, nor assumed, to be a word of limitation. It directs nothing as to the devolution or succession of the estate after it is invested in the original devisees or first takers, and its sole purpose seems to be to point them out. An estate not of inheritance, an estate for life or a term of years, or a chattel, may be limited to persons not otherwise de-

scribed than as the heirs of the body of a deceased person; and so an estate of inheritance may be limited to persons thus designated without any attempt to direct its transmission, as in a course of descent from that ancestor.

"In the first class of cases, the word heirs is necessarily, and in the last case, is obviously one simply of description, whereby the donor or testator declares under a general term, instead of mentioning by their names, the persons whom he contemplates as donees or devisees of his property. It is a collective term so far only as is every term which may comprehend within it more individuals than one, but it is not collective as calling in the whole succession of heirs to the deceased person. Whenever a descriptive phrase is used in any conveyance, instead of an actual nomination, the import of the phrase must be attended to in order to find out the persons meant by it. If it be seen that by the term 'heirs,' those are intended who, at the time referred to, were or might be the heirs at law of the deceased ancestor, of course the law must be consulted to enable the inquirer to determine who answer to this description, and who, therefore, are these first takers. But this determined, the sole purpose of the reference is over; and the persons thus ascertained take simply and purely by virtue of the conveyance in their own persons, not as the representatives of others, precisely as though they had been individually named, or had been described by any other phrase sufficiently explicit to point them out."

The Supreme Court of California, in two separate cases, construing two separate Acts of Congress, has announced and sustained the contentions of appellant.

In *Cooper* v. *Wilder*, 43 Pac., 590 (1896), the Court had before it the construction of the Act of Congress known as the "Timber Culture Act" (20 Stat. L., 113). Under this Act, the land in controversy was entered as a timber culture claim by one David Cooper in 1879. Cooper died

in 1881, testate, but without completing a compliance with the provisions of the Act of Congress. By the will of David Cooper, his widow was made the sole beneficiary. The property was distributed by the Probate Court to the widow. Subsequently, a patent to the land was issued to the "Heirs of David Cooper, deceased." The plaintiff claimed as an heir of David Cooper. Under the said Act of Congress, certain acts must have been completed by the entryman before he was entitled to a patent. The Court held that Cooper, at the time of his death, had not title to the land; that, therefore, he could not devise it; that the heirs took as purchasers directly from the United States; and that when the patent issued it inured directly from the United States in the heirs. Further, that who the heirs were, must be determined by the law of California; but the personnel of the heirs being once determined, they take in equal shares, regardless of the shares they would have taken had it been a title by descent. The language of the Court is as follows:

> "We must hold, therefore, that the land was not devisable, and is not affected by the decree of distribution in the estate of David Cooper, deceased. The grant is to the heirs of David Cooper, but they do not take by inheritance. THE HEIRS WILL THEREFORE TAKE EQUALLY, REGARDLESS OF THE PROPORTIONS IN WHICH THEY WOULD HAVE TAKEN UNDER THE LAWS OF SUCCESSION OF THE STATE. THE UNITED STATES HAS NO GENERAL LAW OF SUCCESSION. THE HEIRS MUST, THEREFORE, BE FOUND BY THE LAW OF THE STATE OR TERRITORY IN WHICH THE LAND IS SITUATED. BY THE LAW OF THIS STATE, THE WIDOW IS AN HEIR OF THE HUSBAND. THE PLAINTIFF AND THE WIDOW WOULD THEREFORE TAKE EQUALLY."

This case, we submit, is identical with the case at bar. While the language of the "Timber Culture Act" and the Act under consideration are not identical, yet the all controlling fact is the same. Under both acts, the conveyance was made

to the heirs direct, and the heirs taking as purchasers, take without reference to the proportion they would have taken had it been a case of title by descent.

In the case of *Braun* v. *Mathieson*, 116 N. W. Rep., 789, the Supreme Court of Iowa had before it for construction the said Timber Culture Act, approved June 14, 1878. In that case, one Ludwig Braun entered the land in controversy, and died before receiving a patent to the land. That after, under the terms of the Act, a patent was issued to the "heirs of Ludwig Braun, deceased." And the Court, following the decision of the Supreme Court of California in the case of *Cooper* v. *Wilder, supra*, and the decision of this Honorable Court in *Hall* v. *Russell, supra*, said:

> "The statute provides that, if the person making such entry at the time when the right to a patent accrues is dead, the 'heirs or legal representatives' of the entryman may prove compliance with the provisions of the Act, and accordingly the patent to the land in question was issued to the 'heirs of Ludwig Braun, deceased.' *It has uniformly been held that such a patent under the timber culture act or other statutes containing similar provisions passes title directly to the heirs as substituted beneficiaries, who take by purchase, and not by descent, and that the title vests in such heirs by the grant, and not as successors to the interests of the deceased entryman.*
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> *Hall* v. *Russell*, 101 U. S. 503, 25 L. Ed., 829;
> *Hersberger* v. *Blewett* (C. C.), 55 Fed., 170;
> *Haun* v. *Martin*, 48 Or. 304, 86 Pac., 371;
> *Walker* v. *Ehresman* (Neb.), 113 N. W., 218;
> *Warner Valley Stock Co. v. Morrow*, 48 Or. 258, 86 Pac. 369;
> *Gould* v. *Tucker* (S. D.), 105 N. W. 624;
> *Wittenbrock* v. *Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32;
> *Cooper* v. *Wilder*, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163;
> *Aspey* v. *Barry*, 13 S. D. 220, 83 N. W. 91.

The widow of the deceased entryman acquires no interest as such; no title having passed to the entryman in which she can take a right of dower.

Quinn v. *Ladd*, 37 Or. 261, 59 Pac. 457;
Mayhard v. *Hill*, 25 U. S. 190, 8 Sup. Ct. 723, 31 L. Ed. 654.

"The sole question for determination, then, is whether under the description of the grantees in the patent as Ludwig Braun's 'heirs' his widow acquired any interest. As there is no law of descent under the statutes of the United States, the term 'heirs' is to be construed in accordance with the local law.

Hall v. *Russell*, 101 U. S. 503, 25 L. Ed. 829;
Wittenbrock v. *Wheadon*, 128 Cal., 150, 60 Pac. 664, 79 Am. St. Rep. 32;
Caldwell v. *Miller*, 44 Kan. 12, 23 Pac., 946;
Hutchinson Inv. Co. v. *Caldwell*, 152 U. S. 65, 14 Sup. Ct., 504, 38 L. Ed., 356.

But the local law is resorted to, not for the purpose of determining the distribution of the estate of a deceased person, but only to determine who are the grantees under such description in the patent. When the persons coming within the description of 'heirs' are determined by the local law, their interests are fixed by the patent itself, and not by the law of descent and distribution.

Gould v. *Tucker* (S. D.) 105, N. W. 624;
Wittenbrock v. *Wheadon*, 128 Cal. 150, 60 Pac. 664, 79 Am. St. Rep. 32;
Cooper v. *Wilder*, 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163.

In this State the widow, so far as her dower interest is concerned—that is, taking as a widow only—there being direct descendants of deceased, is not an heir.

Kuhn v. *Kuhn*, 125 Iowa, 449, 101 N. W. 151;
Phillips v. *Carpenter*, 79 Iowa, 600, 44 N. W. 898;
Rausch v. *Moore*, 48 Iowa, 611, 30 Am. Rep. 412;
Blackman v. *Wadsworth*, 65 Iowa, 80, 21 N. W. 190.

> And this has been the construction placed upon the term 'heirs' by the Land Department of the United States under the timber culture statute. King Timber Culture Entry, 1 Land Dec. Rep. Int. 148; Taylor Timber Culture Entry, 1 Land Dec. Dep. Int. 163; *Rabuck* v. *Cass*, 5 Land Dec. Dep. Int. 398; *Starkweather* v. *Starkweather*, 15 Land. Dec. Int. 162."

Again, in the case of *Wittenbrock* v. *Wheadon*, 60 Pac., 664, the Supreme Court of California had under consideration Section 2269 of the Revised Statutes of the United States. That section is as follows:

> "Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claims by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of the heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs as if their names had been specifically mentioned."

In this case, one Theodore Wheadon, made his declaratory statement under the pre-emption laws, and made no payment other than the fees for making the declaratory statement. He died, leaving a widow and three children. After his death, the widow qualified as administratrix, made all required payments and a patent was issued by the United States to the "Heirs of Theodore Wheadon, deceased."

On suit brought by the widow for a distribution of the estate, the lower court held that the widow, under the law of descent, was entitled to one-half of the property, and each of the three children entitled to one-sixth. On appeal the decision of the lower court was reversed, the Appellate Court holding that the law of the State of California must be looked to to determine who would qualify as heirs; *but*

this once determined the heirs would take equally, regardless of the shares they would have taken by descent. The Court, in its opinion, says:

> "The title thus given by the patent is not to the estate of the descedent, but by the terms of the section, the patent shall 'cause the title to inure to the heirs.' The heirs do not take the title by descent from their ancestors, but the land is conveyed to them directly from the United States—as the land was no part of the estate of Theodore Wheadon, it was not subject to the jurisdiction of the Superior Court, and is not affected by the decree of distribution of his estate subsequently made by that court. Neither is the title which inures to the heirs by the patent affected by the declaration of homestead filed by him. At the time it was filed and recorded, he had no estate, legal or equitable, in the land, but merely a privilege which terminated at his death.
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> * * * * * *
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> "For the purpose of determining who are the heirs of the deceased, resort is to be had to the laws of the State under which the descent is cast. * * *
>
> "Under the laws of this State, the widow and three children were the heirs of Theodore Wheadon, and became vested with the title to the land. *As they did not take the land by inheritance from their ancestor, but by direct conveyance from the United States, the portion taken by each heir is not determined by the law of inheritance*, but by the terms of the conveyance. Section 2269 vests the land in them *equally*, and consequently the widow and each of the children took by the patent an undivided quarter of the land."

We submit that the principles announced by these cases are absolutely sound and are all decisive of the proposition under consideration.

Counsel for appellees admit that they believe the decisions to be sound, equitable and just, and assign as a

reason for their belief that, inasmuch as the heirs occupied the land after the death of the settler, and paid the consideration for the land, that they should take the land in equal parts. However, in the case of *Wittenbrock* v. *Wheadon,* the widow of the original settler having made the required payments, made this identical claim, and it was not allowed by the Supreme Court of California.

While there is some conflict in the decisions where the testator makes a devise to his heirs, or to the heirs of a third person, there is, nevertheless, entire unanimity in the decisions construing a public grant to the heirs.

Walker v. *Ehresman* (Neb.), 113 N. W. Rep., 218;
Aspey v. *Barry* (S. D.), 83 N. W. Rep. 91.

And it will be noted that without exception the authorities relied upon by the appellees to support their contention that the heirs take per stirpes, and not per capita, are causes involving the construction of wills wherein devises are made to a testators' heirs or to the heirs of a stranger.

Now, if the Court please, the section of the Act of Congress under which the lands in controversy were patented, provided that the lands to which a deceased citizen would be entitled, if living, shall descend to and be allotted to his heirs. Under this section, the United States and the Creek Nation had the power and authority to specifically name and designate the heirs and the grantees in each patent. Suppose this procedure had been adopted. In other words, suppose "A," who was entitled to enrollment, died, leaving "B," "C" and "D" as his heirs; and after the name of "A" was placed on the approved Creek citizen roll, a patent issued to the lands to "B," "C" and "D." Would it then be contended that "B," "C" and "D" took the shares and proportions of the lands that they would have taken under the laws of descent of the State of Arkansas, had "A" died seized of the land? Most assuredly not. On the contrary, it would necessarily be held that each of the

grantees named in the patent would take an undivided one-third, regardless of the shares or proportions which they would have taken under the laws of intestacy and descent.

In the foregoing discussion, we have, to a degree, anticipated the contention of the appellees. Their contention is that George Franklin Berryhill, the intervenor and appellant's lessor, had but a life estate in the lands in controversy; that, therefore, the lease to complainant is void, as the life tenant had no interest in the deposits of oil and gas.

To give color to their contention, they have resorted to the Tenth Section of the said Chapter 49 of Mansfield's Digest of the Statutes of Arkansas (M. D., Sec. 2531), which is as follows:

> "In cases where the intestate die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

The fallacies in this contention, we submit, are manifold. As shown by the case of *Kelly's Heirs* v. *McGuire*, 15 Ark., 555, this section sets forth the exceptions to the general table of descents as shown by Section 1 (M. D., Sec. 2522), and in determining the line of succession in any given case, we must look first to Section 1 as establishing the general line. Next to be examined, is the Tenth section, to ascertain if our case comes within the exceptions of that section.

The very first inquiry in determining the application of this Tenth section is the quantity and quality of the estate of which the intestate died seized. Actual seizin is

absolutely necessary before this section is applicable. The next inquiry is the source of the decedent's title.

Now, examining the First section, we find that George Franklin Berryhill, the father, is the heir nearest in the line of succession, and that under that section he takes the fee, unless the case comes under the exceptions set forth in the Tenth section. This latter section says, that if the estate came to the intestate from the father's line, it shall go back to the father and his heirs; if from the mother's line, then to the mother and her heirs; but, if the estate be a new acquisition to the intestate, that is, an estate acquired by the intestate during his lifetime through his own industry, or by gift or devise from a stranger, it shall, on his death, go to his father for life, and in remainder to the intestate's collateral kindred. To say that, in the present case, the lands in controversy were a "new acquisition" to Andrew J. Berryhill, we submit, would be untrue; and equally so to say that the law applicable to "new acquisitions" should be considered applicable.

It is, nevertheless, urged by the appellees that the Court should treat the present case as one of title by descent, and a new acquisition in the hands of Andrew J. Berryhill; that Section 10 (M. D., Sec. 2531), should be looked to for the rule, and that that section should vest in the father, George Franklin Berryhill, but a life estate, with the remainder in fee to the paternal uncles and aunts, the grantors of the appellee, D. A. McDougal; this, under the clause of said section, which sends the remainder "to the collateral kindred of the intestate in the manner provided in this act." We would ask, where in said Chapter 49, are the collateral kindred nominated? Appellees would have us believe that they are to be determined by the provisions of the next succeeding section (M. D., Sec. 2532), which are, that "in default of a father," the state shall go, "first, to the brothers and sisters of the father;" next "to the broth-

ers and sisters of the mother." Obviously, this section is inapplicable. The record shows that the father is a party to this suit. We submit that the words of Section 10, "to the collateral kindred in the manner provided in this act," have reference solely and exclusively to the collateral kindred as pointed out in the first section of the chapter, which sets forth the general line of descent. So that by appellees' own argument, they must ignore the first section in their attempt to fix the life estate in the grantor of the appellees, Edmond McKay and Perry McKay; and must then recognize the first section to fix the remainder in fee in the grantors of the appellee, McDougal, *and must further argue that the first section is not available to the appellant for any purpose whatever.*

To vest a life estate in the father of Andrew J. Berryhill, resort must be had to two separate fictions: *First,* it must be assumed that the estate came to the father by descent from his son, Andrew J. Berryhill; and, *second,* that the estate was a new acquisition in the hands of Andrew J. Berryhill.

We confidently assert that no fiction is necessary or warranted. The facts and the law are to be taken as they present themselves, and the all controlling fact is that Andrew J. Berryhill never had the least vestige of any right, title or interest, either legal or equitable, in the lands in controversy, nor in any other lands in the Creek Nation. The lands here are a new acquisition *in the hands of the heirs;* the heirs are the recipients of the Government's bounty; who the heirs are must be determined by an examination of the said Section 1 (M. D., Sec. 2522), of the Arkansas law of descent; and that section, pointing out the father as the first and nearest in line to the intestate, vests the title to him absolutely by purchase.

The appellees say that the Arkansas law of descent not only nominates the heirs, but also defines the quantity and

duration of the estate to be taken by them. We submit that under the authorities heretofore cited, this contention is wrong; but, admitting it, for the sake of argument, still George Franklin Berryhill, the father, would have taken the fee, and not a mere life estate. The one section of the whole chapter of the Arkansas law of descent which provides for the vesting of a life estate in either the father or mother, is said Section 10 (M. D. 2531), and that only where the intestate dies *seized* of an estate which is a new acquisition to him. The new acquisition here is to the heirs; and, unless the Court broadly assumes a different state of facts, Section 1 (M. D., Sec. 2522), is the only section to be considered. Under that section, even it is determined that the word "heirs" defines not only the personnel of the grantees, but also the quantity of their estate, still the conclusion is irresistible that the father would take the whole estate in fee. Appellees must affirmatively bring their case within the exceptions of Section 10 (M. D., Sec. 2531), otherwise the section has no application.

Further assume, for the sake of argument and illustration, that the authorities relied on by appellees, involving the construction of wills, are sound, and that in the Indian Territory "A" died leaving a will devising his estate to the heirs of "B." And assume that "B's" surviving relatives were a father and several paternal uncles. Who would take the devise as "heirs?" Would Section 10 be held applicable, and a life estate carved out and vested in the father, with the remainder in fee in the paternal uncles, or would we look to Section 1, the general table of descents, and give the estate in fee to the father? We submit that this question answers itself; and that the father, under the general table of descents set out in Section 1, would take the entire interest in the estate devises, and that Section 10, relating to ancestral estates and new acquisitions, could not and would not be considered.

The Secretary of the Interior, in considering the approval of the oil and gas lease under which the appellant claims, had before him this same question, and, in approving the lease to the appellant, gave his decision to the effect that the father, George Franklin Berryhill, as sole heir, was at the time seized in fee of the lands in controversy. The rules and regulations promulgated by the Secretary of the Interior (printed Transcript, pp. 9 and 220), require that in leases on lands allotted to heirs, full proof of heirship must be submitted. The proof submitted by the appellant and the lessor was complete, as was evidenced by the approval of the Secretary. We do not insist that the decision of the Secretary of the Interior is in anywise controlling, but, we submit, that under the decisions of our Federal Courts, his decision is entitled to consideration, and will not be overruled unless cogent reasons exist for doing so.

Brown v. *United States*, 113 U. S., 558-574;
United States v. *Moore*, 95 U. S. 763;
Edwards v. *Darby*, 12 Wheat., 206;
Heath v. *Wallace*, 138 U. S., 582;
Eells v. *Rose*, 64 Fed., 420;
Peabody v. *Stark*, 16 Wall., 240;
Hahn v. *United States*, 107 U. S., 402;
Farrell v. *United States*, 49 C. C. A., 183-193.

It was denied by counsel for appellees on the hearing of this cause before the Honorable Circuit Court of Appeals that this question was considered by the Department of the Interior, but in view of the fact that the distinction between lands *inherited by* heirs of a deceased citizen, and lands *allotted to* heirs of a deceased citizen has been maintained in all the series of rules and regulations promulgated by the Secretary of the Interior, and, further, considering the opinion of the Interior Department in the Melissa Wiley case heretofore mentioned, we believe that we are justified in saying that the proposition we have under discussion

was fully considered in the approval of the oil and gas mining lease to this appellant.

And we confidently assert that the conclusion as evidenced by the approval of the appellant's lease is sound and should be affirmed by this Honorable Court.

(C) If it be held that the lands in controversy should be considered as having come to the "Heirs of Andrew J. Berryhill," by descent and not by purchase; then they should be held to be an "Ancestral Estate" in the heirs under the provisions of the laws of the State of Arkansas, and title in fee-simple thereby vested in the father, George Franklin Berryhill.

The Circuit Court of Appeals for the Eighth Circuit, in its opinion, holds that the word "descend" occurring in Section 7 of the Supplemental Creek Agreement (32 Stat. L., p. 500), is inapplicable to the estate we are considering in this cause, saying that "the word 'descend' is a word of art, and indicates the transference of property by inheritance." While we confidently believe that we are right in our insistence that the word "descend" being entirely inapplicable, and should therefore be considered in a popular sense as "to go to," or "to pass to," and thereby vest the estate in the heirs as purchasers, yet, if we be wrong in this insistence, and if it be held that the words of said Section 7 of the Supplemental Creek Agreement necessitate a decision of this cause on the assumption that Andrew J. Berryhill died seized of the lands in controversy, and if it be further held that Section 1 of the Arkansas law of descent is not controlling, but that resort must be also had to the exceptions set forth in Section 10 of that law, then we insist that this Honorable Court should hold that the estate came to the heirs as an "ancestral estate" from the father within the purview of Section 10 of the Arkansas laws of descent, and not as a "new acquisition," and that, therefore, the entire estate vested in the father in fee simple.

For convenience, we requote Section 10 of the Arkansas law of descent, which is as follows:

> "In cases where the intestate shall die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs; but if the estate be a new acquisition, it shall ascend to the father for his life-time, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this act; and, in default of a father, then to the mother, for her life-time; then to descend to the collateral heirs as before provided."

As observed by the Honorable Circuit Court of Appeals, "Among the people of Arkansas there was no way of acquiring land except by grant, gift or inheritance. This was true even of lands acquired from the Federal Government under the public land laws. * * * It needs but a moment's thought to see that, when this statute was applied to the lands of the Creek Nation, it was applied to a subject matter entirely different from that which was in the mind of the Legislature of Arkansas. The lands of the tribe fit into neither classes mentioned in the statute. They did not come to a member of the tribe by inheritance from any ancestor, nor could they be spoken of with propriety as a purchase. In applying the statute in this case, therefore, we shall have to proceed by analogy only."

Should this Honorable Court refuse to accept our views as hereinbefore expressed, then we submit that the only alternative is to accept the view taken by the Circuit Court of Appeals. It must be admitted that technically the lands in controversy, and other lands in the Creek Nation, cannot come within the purview of the above quoted Section 10. They are not, strictly speaking, a new acquisition, nor an ancestral estate. Therefore, it must of necessity follow that the Court must resort to an analogy, and if this particular

estate is more analagous to an ancestral estate than a new acquisition, it should be so held.

The history of land tenures in that part of the State of Oklahoma, which formerly comprised the Indian Territory, has heretofore, and quite recently, been presented to this Court. It is sufficient to say that, in the year 1893, Congress created the Dawes Commission, whose duties and powers it was to negotiate with the Five Civilized Tribes, to the end that the tribal titles of the various tribes might be extinguished and the lands allotted among the *bona fide* citizens of the tribes.

We admit that, prior to the extinguishment of the tribal titles, the citizens of the tribes had no individual vested property rights in any particular part of the lands of the tribe. This has heretofore been decided by this Honorable Court.

Goldsby v. *Garfield*, 211 U. S., 249;
Fleming v. McCurtain, 215 U. S., 56.

However, the citizens of each tribe did have certain valuable rights in the general tribal property, of which they could not be lawfully divested. They had the right to participate in all tribal affairs and government, and had the right to the surface of the tribal lands, and the right to participate in the final allotment and distribution of the tribal lands and funds. This right each descendant in turn derived from his ancestor, and while the right died with the individual, yet the source of the right was the ancestor. So in the case at bar; under the Act of Congress, approved June 30, 1902, nine months after the death of Andrew J. Berryhill, it was the father, George Franklin Berryhill, who was the *propositus* from which the right to the allotment of the lands in controversy was derived. And the right of every citizen of the Creek Nation came to him by the blood of his tribal parent. If, as is urged by the appellees, the supposed intention of Congress and the Creek Tribe, as

expressed in the various Treaties and Acts, looking to a divestitute of the tribal title is to be followed and given effect, then the general plan of allotment must be held to be a general partition of lands among tenants in common, rather than a new grant to each individual citizen.

It seems to us that it would give rise to a glaring inconsistency to hold that there should be no distinction made between lands *inherited* by the heirs from a deceased Indian, and lands *allotted* to the heirs of a deceased Indian; and then in the next breath to assert that if the deceased citizen came by his right to his land through his parents, that the source of that right should be discarded, and that the grant should be considered as having come to the deceased by gift from a stranger. If a strict and technical construction is justified in one instance, it should be had in both instances. In other words, if it be held that the source of the right of a citizen to an allotment is to be disregarded, and only the grant from the United States and the Creek Nation to the citizen is to be considered, then the grant to the heirs of a deceased citizen should be considered in the same way, and no regard should be given to the deceased citizen. Under this construction, the truth of the propositions which we have heretofore advanced must inevitably follow, and the heirs, the grantees named in the patent, would be held to be grantees taking by purchase and not by descent. On the other hand, if it be held that the source of the right of a citizen to an allotment is to be regarded, and no distinction is to be made between lands inherited by the heirs from a deceased citizen, and lands allotted to the heirs of a deceased citizen, then it must of necessity follow that the lands in controversy must be held to have come to the deceased, Andrew J. Berryhill, from the father, and thereby being an ancestral estate, go back to the father in fee simple. In no event, and under no consistent construction, we submit, can the lands in controversy be considered as a new acquisition in the deceased, Andrew

J. Berryhill, so as to vest but a life estate in the father, George Franklin Berryhill.

We admit that the status of an allotment of land in either of the Five Civilized Tribes as to whether on the death of the allottee it is an ancestral estate or a new acquisition, has been a much mooted question among members of the bar of the State of Oklahoma, and that this is the first time the exact question has been presented to this Honorable Court. We believe it to be a well settled proposition of statutory construction, that where the construction or interpretation is doubtful, that construction will be accorded which will tend to settle property rights, rather than to unsettle them. Now if it be held that the heirs in the case at bar take title by descent, and not by purchase, then to further hold that the lands are an ancestral estate, would render inherited titles easily ascertained. On the other hand, to hold the lands a new acquisition, and vest but a life-estate in the parent, with the remainder in remote collaterals, would render inherited titles unsettled and unsafe, and in innumerable cases would give rise to the same vexatious claims as is evidenced by the claims of the appellee, McDougal, in this case.

The Honorable Circuit Court of Appeals chose to consider the estate involved in this case as having come to the father of Andrew J. Berryhill by descent, and not by purchase; and while we respectfully insist that this is error, yet if this Honorable Court accept the view of the Circuit Court of Appeals in this respect, then we insist with confidence that the further conclusion of that Court is correct, and the estate should be held to be an *ancestral* estate.

SECOND PROPOSITION

The Honorable Circuit Court of Appeals erred in not holding and adjudging that the appellees, Keifer Oil and Gas Company, D. A. McDougal, Edmond McKay and Perry McKay, received the various leases and deeds under which they claim, subject to all of the rights and interests of the appellant, Albert W. Shulthis, acquired under the oil and gas mining lease executed to him by the intervenor, George Franklin Berryhill.

This proposition, if the Court please, will become material to a decision of this cause in but one event; if this Court accepts our contention that the lands in controversy came to George Franklin Berryhill, the father of Andrew J. Berryhill, by purchase under the patent from the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, deceased," then it must follow that the restrictions on the alienation of the land were not removed by Section 22 of the Act of April 26, 1906 (34 Stat. L., 145), and the deed to the appellees, McKays, was void, and consequently therefore the subsequent leases and assignments were likewise void. And the question of notice or *bona fide* purchaser becomes immaterial. However, if this Honorable Court holds that the lands in controversy are to be considered as having come to George Franklin Berryhill, the father of Andrew J. Berryhill, by descent, and not by purchase, and thereby come within the purview of said Section 22 of the Act of Congress approved April 26, 1906, then our Proposition Two, as above laid down, does become material to a determination of the rights of the parties to this cause.

Two propositions are presented by the record; *one*, that the appellees took their various conveyances subject to the rights of this appellant, as a matter of law; *second*,

that the evidence in the record discloses that the appellees took their conveyances with notice and knowledge of this appellant's lease as a matter of fact. To sustain these matters, we assert the truth of the following:

(A) The Act of Congress approved February 19, 1903 (32 Stat. L., p. 841), entitled, "An Act Providing for the Record of Deeds and Other Conveyances and Instruments of Writing in Indian Territory, and for Other Purposes," had no application to mineral leases covering lands from which restrictions against alienation had not been removed, and such leases executed in accordance with the rules and regulations promulgated by the Secretary of the Interior under the authority of the "Supplemental Creek Agreement" (32 Stat. L., 500), and approved by the Secretary of the Interior, were not within the purview of that act.

The Act of Congress under which the oil and gas mining lease to this appellant was executed, we know as the "Supplemental Creek Agreement," approved June 30, 1902, and heretofore referred to.

Section 17 of that agreement, is as follows:

> "Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation to renew the same. Such leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, *and leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.*"

We assert, without fear of contradiction, that under the provisions of this section, the Secretary of the Interior

had full power and authority to promulgate and put into effect rules and regulations governing the leasing of lands in the Creek Nation for oil and gas mining purposes. We further assert, and we believe the assertion cannot be successfully controverted, that the rules and regulations of the Secretary of the Interior promulgated and put into effect under the authority conferred by this section *have the force and effect of law, and are matters of which the courts will take judicial notice.*

United States v. *Eaton*, 144 U. S. 677, 36 L. Ed., 591;
Gratiot v. *U. S.*, 4 How. (U. S.) 80, 117;
Caha v. *United States*, 152 U. S. 222;
United States v. *Bailey*, 9 Peters 253;
Wilkins v. *United States* (C. C. A. 3rd Cir.) 96 Fed. Rep. 84;
United States v. *Thurston Co., Nebraska* (C. C. A. 8th Cir.) 143 Fed. Rep., 291;
Dastervignes v. *United States* (C. C. A. 9th Cir.) 122 Fed. 30;
United States v. *Ormsbee*, 74 Fed. Rep., 207.

In the case of the *United States* v. *Thurston County, Nebraska (supra)*, the Circuit Court of Appeals for the Eighth Circuit, had before it for consideration an Act of Congress approved May 27, 1902 (32 Stat. L., 275), which authorized heirs of Indian allottees to sell lands inherited by them, with the approval of the Secretary of the Interior. This Act, however, had no application to lands of the Five Civilized Tribes in Indian Territory. The Circuit Court of Appeals there said:

> *"The Act of Congress authorized the Secretary to make these regulations for the purpose of carrying into effect the Act of 1902, and when made they had the force and effect of statutory enactments."*

In *United States* v. *Eaton, supra*, this Honorable Court, speaking through Mr. Justice BLATCHFORD, said:

"Regulations prescribed by the heads of departments, under authority granted by Congress, may be regulations prescribed by law, so as lawfully to supports Acts done under them and in accordance with them, and may thus have, in a proper sense, the force of law."

We further desire to call the Court's attention to the case of *Caha* v. *United States*, *supra*, decided by this Honorable Court in the year 1893.

In that case the defendant was charged with the crime of perjury, committed in the land office at Kingfisher, Oklahoma, in falsely testifying in a contest concerning the defendant's *homestead* entry. The oath is charged in one count to have been administered by the receiver of the land office and in the second by the register.

Section 5392 of the U. S. Statutes at Large reads as follows: "Every person who, having taken an oath before a competent tribunal, officer or person, IN ANY CASE IN WHICH A LAW OF THE UNITED STATES AUTHORIZES an oath to be administered * * * shall be guilty of perjury."

The contention of the defendant was that the statute nowhere made provisions for contest before the officers named in the indictment in reference to HOMESTEAD entries, and that inasmuch as the statutes do not authorize any such contest, it cannot be said that the oath was taken in a CASE IN WHICH A LAW OF THE UNITED STATES AUTHORIZES an oath to be administered.

Section 441 of the Revised Statutes provided: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: *First:* * * * *Second:* The public lands."

Section 2478 provides:

"The Commissioner of the general land office under the direction of the Secretary of the Interior is au-

thorized to enforce and carry into execution, by APPROPRIATE REGULATIONS every part of the provisions of this title, not otherwise specially provided."

Section 2246 provides: "The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the general land office."

The Court said:

"General rules of practice have been adopted and promulgated by the Interior Department. * * * By these rules of practice express provision is made for a contest before the local land office in respect to homestead as well as pre-emption entries, and for the taking of testimony, etc. We have, therefore, a general grant of authority to the land department to prescribe appropriate regulations for the disposition of public lands, a specific Act of Congress authorizing contests before the land office in cases of pre-emption, rules and regulations prescribed by the land department for contests in all cases of the disposition of public lands, including both pre-emption and homestead entries, and frequent recognition by Acts of Congress of such contests in respect to homestead entries. Clearly, then, the local land office in hearing and determining a contest with respect to a homestead entry constituted a competent tribunal and the contest so pending before them was A CASE IN WHICH THE LAWS OF THE UNITED STATES authorized an oath to be administered."

The Court further said:

"Another matter is this, the rules and regulations prescribed by the Interior Department in respect to contests before the land office were not formally offered in evidence. * * * It may be laid down as a general rule deducible from the cases, that wherever, by the express language of any Act of Congress, power is intrusted to either of the principal departments of Government to prescribe rules and regulations for the transaction of business in which the public is inter-

ested and in which they have a right to participate, and by which they are controlled, the rules and regulations prescribed in pursuance to such authority become a MASS OF THAT BODY OF PUBLIC RECORDS OF WHICH THE COURTS TAKE JUDICIAL NOTICE."

A much stronger case, and one directly in point, is the case of *United States* v. *Bailey, supra,* 9 Peters (U. S.), 253:

In this case the defendant was indicted for false swearing. The indictment charged that the false swearing had been made in an affidavit by the defendant before a justice of the peace in the State of Kentucky. The prosecution proved that in pursuance to an Act of Congress, the Secretary of the Treasury did establish as A REGULATION OF THE DEPARTMENT, that affidavits made and subscribed before any justice of the peace of any of the States would be received and considered.

Justice STORY, in delivering the opinion of this Honorable Court, said:

> "It is admitted that there is no statute of the United States which expressly authorizes any justice of the peace of a State, or, indeed, any officer of the National Government, judicial or otherwise, to administer an oath in support of any claim against the United States. And the question is whether, under these circumstances, the oath actually administered in this case was an oath upon which there would be a false swearing within the true intent and meaning of the Act of 1823. * * *In the present case, the oath was administered by a State magistrate, having an admitted authority under the State laws to administer oaths, *virtute officii*, in many cases, if not in the present case; and it is further found in the case, that there was evidence at the trial conducing to prove (and for the purpose of the present argument, it must be taken as proved) that the Secretary of the Treasury did establish a regulation authorizing affidavits made before any justice of the

peace to be received and considered in proof of claims under the Act of 1832; so that the solution of the question now before us depends upon this, whether the oath so administered under the sanction of the Treasury Department is within the true intent and meaning of the Act of 1823. * * *There being no express authority given by any law of the United States to any State magistrate to administer an oath in the present case, the next inquiry naturally presented is, whether the Secretary of the Treasury had an implied power to require, authorize, allow or admit any affidavit sworn before State magistrates, in proof or in support of any claim under the Act of 1832. * * * We are of the opinion that the Secretary of the Treasury did, by implication, possess the power to make such a regulation and to allow such affidavits in proof of claims under the Act of 1832. * * *It may be added, that it has been stated by the Attorney General, and it is of public notoriety, that there has been a constant practice and usage in the Treasury Department in claims against the United States, and especially of a nature like the present, to require evidence by affidavit in support of the claim, whether the same has been expressly regulated by statute or not; and that, occasionally, general regulations have been adopted in the Treasury Department for this purpose. * * *

"Upon the whole, we are of the opinion that where the oath is taken before a State or National magistrate, authorized to administer oaths, in pursuance of any regulations prescribed by the Treasury Department, so that the affidavit would be admissible evidence at the Department in support of any claim against the United States, and the party swears falsely, the case is within the purview of the Act of 1823."

The foregoing authorities, we submit, effectually settle our contention that the rules and regulations promulgated by the Secretary of the Interior under the authority of Section 17, above quoted, of the "Supplemental Creek Agreement," have the force and effect of statutory enactments,

and are matters of which this Honorable Court will take judicial notice.

We further submit that, if as in the *Caha* case, and the *Bailey* case, the rules and regulations of the heads of the executive departments of our Government be sufficiently deemed "Laws of the United States" for the violation of which a person may be deprived of his liberty, that then the rules and regulations of the Department of the Interior promulgated under Section 17 of the "Supplemental Creek Agreement," governing the execution and approval of oil and gas mining leases in the Creek Nation are sufficiently laws of the United States upon which property rights as evidenced by the lease of this appellant may be based, and thereafter protected. Now, the first rules and regulations of the Secretary of the Interior governing the leasing of lands in the Creek Nation for oil and gas purposes were promulgated and became effective January 21, 1903, about a month prior to the "Recording Act" mentioned in this "Proposition A." These rules, with but few changes, were in full force and effect on March 24th, 1906, the date of this appellant's lease. *On this latter date, no Indian member of the Creek Nation could sell, nor could he lease any of his lands for oil and gas purposes, except with the approval of the Secretary of the Interior; and all oil and gas leases on Indian lands at that date must have been executed in exact accordance with the rules and regulations of the Secretary of the Interior—otherwise they would have been absolutely void and not susceptible of ratification in any manner.*

A true copy of the rules and regulations in force at the time of the execution of this appellant's oil and gas mining lease, on, to-wit, March 24, 1906, is shown in the record at page 315. These rules and regulations, by which both this appellant and his lessor were bound, provide:

"*Section 5.* No lease will be approved for a great-

er term of years than as follows: Three years for grazing purposes, ten years for agricultural purposes, and fifteen years for mineral purposes. *All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian affairs, one with the Agent, Union Agency, one to be delivered to the lessee, and one to the lessor.*

*"Section 16. * * * All leases which require the approval of the Secretary of the Interior must be submitted to the Indian Agent, Union Agency, for transmittal within 30 days from and after the date of the execution of the lease, and all such leases which have been heretofore executed must be submitted to said Agent within 30 days from the date of approval of this amendment. No such lease presented after the time herein designated will be received by the agent or transmitted to the Department or regarded as having any effect whatever."*

Now the first of these rules and regulations became effective January 21, 1903, and thereafter, and on February 19, 1903, was approved, the Act of Congress which we designate the "Recording Act" (32 Stat. L., p. 841), entitled, "An Act Providing for the Record of Deeds and Other Conveyances and Instruments of Writing in Indian Territory and for Other Purposes." The provisions of this Act, so far as material, are as follows:

"That chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest of eighteen hundred and eighty-four, is hereby extended to the Indian Territory, *so far as the same may be applicable and not inconsistent with any law of Congress.* * * *"

By extending the said Chapter 27 only so far as applicable and consistent with prior legislation by Congress, all idea of a repeal or limitation of the former grant of powers to the Secretary of the Interior is eleminated. The au-

thority of the Secretary with reference to oil and gas leases on restricted land, was absolutely the same after February 19, 1903, as it was prior thereto. This proposition is undoubtedly sound and cannot be seriously controverted. Chapter 27 of Mansfield's Digest of the Statutes of Arkansas provides:

> "*664.* Every deed or instrument in writing conveying or affecting real estate which shall be acknowledged or proved and certified, as prescribed by this Act, may, together with the certificate of acknowledgemnt, proof, relinquishment of dower, be recorded by the recorder of the county where such land to be conveyed, or affected thereby, shall be situate, and when so recorded, may be read in evidence without further proof of execution.
>
> "*665.* If it shall appear at any time that any deed or instrument duly acknowledged or proved and recorded as prescribed by this Act, is lost or not within the power and control of the party wishing to use the same, the record thereof or transcript of such record certified by the recorder, may be read in evidence without further proof of execution. * * *
>
> "*671.* No deed, bond or instrument of writing, for the conveyance of any real estate, or by which the title thereto may be affected in law or equity, hereafter made or executed, shall be good or valid against a subsequent purchaser for a valuable consideration without actual notice thereof." * * *

It is under the provisions of these sections that the appellees claim a priority over the lease to this appellant, and claim that they take the lands in controversy free of this appellant's lease. It must be conceded that the Congress of the United States intended that full force and effect be given to each and every word of the adopting clause of the "Recording Act." From the words "so far as the same may be applicable and not inconsistent with

any law of Congress," we must inevitably conclude that Congress had in contemplation certain conditions under which the recording act of Arkansas was not to be applied; and it must be conclusively presumed that Congress passed the Act of February 19, 1903, in full consideration of the rules and regulations of the Department of the Interior then existing. Now the position which we take, and to which we ask this Honorable Court to subscribe, is that the sections above quoted of the Arkansas law are inconsistent with the above quoted Section 17 of the "Supplemental Creek Agreement," and that the authority therein granted to the Secretary of the Interior to make all advisable rules and regulations in respect to mineral leases, are inapplicable to Departmental oil and gas leases on lands from which the restrictions against alienation had not been removed at the time of the execution of the lease to this appellant.

The Honorable Circuit Court of Appeals, in its opinion, sets forth this question: Was the warranty deed from George Franklin Berryhill to the McKays, executed on June 5th, 1906, subject to the lease executed to the appellant by George Franklin Berryhill on March 24th, 1906? And then says: "The lease was not recorded, and to answer this question we must first inquire whether it was subject to the registration law then in force in the Indian Territory, *for it was not subject to that law, its priority in time would give it priority of right over the deed.*" The legal principle here enunciated is undoubtedly well established.

That Court reached the conclusion that appellant's lease was subject to the recording laws; but we respectfully submit that the conclusion was reached through a misinterpretation of the Act of Congress of February 19, 1903, and a misinterpretation of the rules and regulations of the Secretary of the Interior, lawfully prescribed, and governing the leasing of lands in the Creek Nation; and by

such misinterpretation deprived the appellant's lease of the priority to which, by the principle of law set forth by that Court, it is entitled.

To exemplify this to this Honorable Court, we quote from the opinion of the Circuit Court of Appeals as follows:

> "Pursuant to rules on the subject, it (appellant's lease) was executed in quadruplicate, one part to be sent to the Secretary of the Interior, another to be filed in the office of the Indian Agent at Union Agency, Muskogee, and the other two parts to be retained by the lessor and lessee."

And further:

> "We can attach no weight to the suggestion of counsel that Shulthis could not record his lease, because under the rules of the Department, one copy was to be delivered to and retained by him. The lease under such circumstances occupied precisely the same position as a deed. He could have filed it in the proper office for record and upon its being recorded it would have been returned to him as the muniment of his right."

Here we respectfully submit that the Circuit Court of Appeals was led into error by its misinterpretation of Section 5 and Section 16 above quoted. One part of the lease was not RETAINED by the lessee, prior to the approval of the lease, nor was one part retained by the lessor; but under the provisions of the above quoted Section 16 of the rules and regulations, all four parts of the lease were filed in the office of the Indian Agent, at Union Agency, for transmittal by him to the Secretary of the Interior: for approval, if there had been an entire and full compliance with all necessary requirements—for disapproval, if not.

Further, under the provisions of said Section 16, *all four parts of the lease must have been filed with the Indian Agent prior to the lapse of 30 days from the date of execu-*

tion of the lease. Had the lessee not filed all four parts of the lease within 30 days, the lease would not even had been received by the Secretary of the Interior for consideration. This is the uniform and settled construction given at all times to Sections 5 and 16 by the Department and the Secretary of the Interior. The lessee retained no part of the lease, and had nothing to record until after the approval of the lease, and until after the delivery to him of the approved quadruplicate part. The appellant's part of the lease is shown by Exhibit "A" to the bill of complaint (Printed Transcript, p. 20), and the agreed statement of facts (Printed Transcript, p. 203), admits that the lease and all the endorsements thereon are correct. It is further admitted that the lessee's part of the lease (the quadruplicate), with the other three parts, were filed in the office of the Indian Agent, at Union Agency, Muskogee, on April 21, 1906, *within the 30-day limit prescribed by the rules and regulations; that all four parts of the lease were approved by the Secretray of the Interior,* April 19th, 1907; *that thereafter, one part was retained on file in the office of the Commissioner of Indian Affairs; the duplicate part retained on file in the office of the Indian Agent, at Union Agency, the triplicate part delivered to the lessor, and the quadruplicate part delivered to the lessee, Albert W. Shulthis.* Then for the first time did the appellant have an opportunity to record his lease; and the records show (Printed Transcript, p. 203), that he immediately on, to-wit: May 18th, 1907, filed the lease for record in the proper recording district; not by virtue of the provisions of the "Recording Act" of February 19th, 1903, but in accordance with the provisions of Section 20 of the Act of Congress approved April 26th, 1906, which are as follows (34 Stat. L., 137):

> "*Section 20.* That after the approval of this Act all leases and rental contracts, except leases and rental contracts for not exceeding one year for agricultural purposes for lands other than homesteads, of full-

blood allottees of the Choctaw, Chickasaw, Cherokee, Creek and Seminole tribes, shall be in writing and subject to the approval by the Secretary of the Interior, and shall be absolutely void and of no effect without such approval; *Provided*, That allotments of minors and incompetents may be rented and leased under order of the proper court: *Provided*, further, *That all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory.*"

The concluding sentence of this section is an express legislative declaration that the recording laws had no prior application to leases on restricted lands, *i. e.*, Departmental leases.

We submit that it would be absolutely impossible for the appellant to have protected himself, if the recording laws put in force in Indian Territory on February 19th, 1903, be held applicable to Departmental leases. In other words, it would have been utterly impossible for the lessee, Shulthis, to have complied both with the provisions of the "Supplemental Creek Agreement" and the rules and regulations of the Secretary of the Interior on the one hand, and the provisions of the Arkansas recording laws on the other. This being so, the conclusion is irresistible that the recording laws of Arkansas, spread over the Indian Territory, by the act of February 19th, 1903, "so far as applicable," have no application to appellant's departmental lease; that therefore, the lease being prior in point of time to the deed under which the appellees, Keifer Oil & Gas Company, and the two McKays claim, is prior in effect.

We do not contend that the records in the Indian Agency afforded "constructive notice" in the sense in which that term is used in the registry acts; but we would submit that under the decision of the Circuit Court of Appeals for the Eighth Circuit in the case of *Martin* v.

United States, 168 Fed. Rep., 198, the office of the Indian Agent is a public office, and the documents therein contained are public documents; and that not the slightest distinction can be made between the documents in the office of the Commissioner to the Five Civilized Tribes from those in the office of the Indian Agent for the Five Civilized Tribes. Under this decision it was not a courtesy on the part of the officer in charge of the records, but it was a right on the part of any interested person, to demand an inspection and to be accorded it.

It cannot be contended that the "Recording Act" in anywise repealed or limited the power or authority of the Secretary of the Interior, granted by Section 16 of the "Supplemental Creek Agreement," to approve oil and gas leases, and provide all advisable rules and regulations with reference thereto.

Now, assume for the moment that there was incorporated in the oil and gas regulations, a rule in substance as follows:

> That no lease recorded prior to the filing of the same in the office of the Indian Agent, at Union Agency, will be received by the Agent for transmittal to the Secretary of the Interior for approval.

The Secretary of the Interior had full power to make such a rule, and we would suggest that such a rule would have been salutary as effectually preventing the clouding of the lessor's title, in case the lease was subsequently disapproved.

In truth and in fact this rule was virtually in operation by reason of the fact that the lease form prescribed by the Secretary of the Interior, as shown at pages 343 to 346 of the record contained no formal acknowledgment so as to entitle the lease to record, and it was by sufferance that the acknowledgment was attached, in order that the lessee might file his lease for record after its approval.

Not until after the passage of the act of April 26th, 1906, providing for the recording of all leases, did all oil and gas lease forms prescribed by the Secretary of the Interior contain a form of acknowledgment, so that all lessees might comply with the provisions of Section 20 (above quoted) of that act.

Again, assume, if the Court please, that Section 16 (above quoted) provided that all leases must be submitted and filed with the Indian Agent, within *three* days of the date of the execution thereof, instead of *thirty* days. This would absolutely be within the power of the Secretary of the Interior, and would destroy the one remote chance of the lessee to comply with both the rules and regulations and the recording laws.

Further, to make the situation impossible, suppose the regulations prescribed that all leases be executed in the presence of the Indian Agent, and retained by him in his office until transmittal to the secretary for approval. This rule would have been perfectly proper.

Now, if it lay within the power of the Secretary of the Interior by virtue of the authority granted him by Section 17 of the "Supplemental Creek Agreement," approved June 30, 1902 (32 Stat. L., 500), to render it utterly impossible for a departmental oil and gas lessee to comply with the "Recording Act" put in force by the act of February 19th, 1903, then certainly it must follow that the "Recording Act" had no application to departmental leases. We need not inquire as to the exercise of the power,—the existence only is sufficient. Today a lessee might have ample opportunity to record his lease before filing the same for approval,—tomorrow, by a change of rules he might be utterly deprived of that opportunity. The existence of this power in the Secretary rendered the recording laws absolutely inapplicable; and to hold that the recording laws were applicable; in the absence of the exercise of that power,

would be holding that the Secretary by rule or regulation could repeal a prior act of Congress.

The case of *Lomax* v. *Pickering,* 173 U. S. 26, cited by the Circuit Court of Appeals in its opinion and relied on by the appellees has, we submit, no bearing on the case at bar. This Court in that case held only that a warranty deed, regular in form, and complying with the conveyancing laws, was entitled to record. This is undoubtedly correct. So, too, a recording office in the Indian Territory could not have refused to receive for record, leases or deeds on restricted lands, if such leases or deeds in all respects complied with the Arkansas conveyancing and recording laws. Even though such lease or deed might be absolutely void by reason of the incapacity of the grantor or lessor. The lease of the appellant, Shulthis, however, shows on its face by express words that it was made under the provisions of Section 17 of the Act of Congress approved June 30, 1902; that it was made subject to the rules and regulations of the Secretary of the Interior, and that the force and effect of the lease was held in abeyance until approved by the Secretary of the Interior. The recorder might record such lease if presented, but under the decision in *Lomax* v. *Pickering,* the record thereof would avail nothing and would not be notice to a *bona fide* purchaser.

The only conclusion in this case which can be drawn from the decision of this Court in the case of *Lomax* v. *Pickering* is that the effect of the deed from George Franklin Berryhill to the McKays, and the subsequent lease of the McKays to Reese, are bound to be the same, irrespective of whether the prior lease from Berryhill to appellant, Shulthis, was recorded or not.

This appellant at the time of the execution of the lease to him by George Franklin Berryhill took the only course that was open to him. He had, we submit, a right to rely on the laws existing at the time of the execution of his

lease, and relying on those laws, and complying with them, he should not, and could not be stripped or deprived of his rights by subsequent legislation.

The exact question we are discussing has heretofore been considered by the Interior Department. The question was referred to the Commissioner of Indian Affairs and it was determined by the Department that special legislation was not necessary to protect the interest of subsequent purchasers, after taking and filing of a lease with the Indian Agent. The Commissioner of Indian Affairs rendered his opinion on January 3, 1907, and after quoting from the case of *Caha* v. *United States, supra,* and after making references to the existing treaties, and to the Act of Congress adopting the Arkansas law, said:

> "I do not believe that legislation is necessary to convey to prospective purchasers of lands in the Creek or Cherokee Nations constructive notice of the contents of the records of the Indian agent at Union agency, concerning leases upon allotted lands, and for that reason I cannot recommend that legislation be requested to cover that question."

He also said in the same opinion:

> "When the Secretary of the Interior issued regulations providing that leases should be filed with the Indian agent at Union agency, and took steps to give the contents of these regulations the widest publicity, he placed upon the parties dealing with these Indian lands, the duty of investigating, not only the records of the United States clerks, who are ex-officio recorders, but the records of the Indian agent at Union agency, as well, if they wished to ascertain the true status of the land.
>
> "Persons buying land from citizens or freedmen of the Cherokee or Creek Nations are charged with knowledge of the fact that there may be in existence, affecting the lands which are not filed with the ex-

officio recorder, but which may have been filed with the Indian agent at Union agency."

We do not undertake to urge that this Court is bound by the view of the Interior Department, but we do urge that it has been repeatedly held by the Supreme Court of the United States that where the interpretation of an Act of Congress falls on any of the executive departments of government and there receives a construction, that construction will not be disturbed or overruled unless obviously wrong. See authorities *supra.*

In the light of the above, we are compelled to say that the conclusion is irresistible, that it was never the intention of Congress in passing the so-called Recording Act of February 19, 1903, to bring oil and gas mining leases upon the lands of allottees of the Five Civilized Tribes, within the terms of that Act. That being so, there is in effect no Recording Act affecting this case. Before the enactment of the Conveyance Recording Acts, of course, instruments affecting the title to land, gained preference and took effect, both at law and in equity, according to their true dates, independent of any notice, either actual or constructive. The record of a deed is equivalent to an actual livery of *seisin.* 1 Conn., 354; 140 Mass., 112; II Washburn, 443.

The whole object of the Registry Acts is to protect subsequent purchasers and encumbrancers against previous conveyances which are not recorded, and to deprive the holder of the previous unregistered conveyance of the right which his priority in execution would have given him at the common law.

Lovey v. *Simpson,* 11 N. J. Equity 246.

The ultimate result, then, in the case at bar, is that the conveyance first executed and delivered must take priority independent of any question of actual or constructive no-

tice, and we submit that the question of notice is not in this case in any manner.

In the case of *Dunham* v. *Dey,* 15 Johnson (N. Y.), 568, the Court said:

> "Before this statute (Recording Act) mortgages gained preference, and took effect as liens, both at law and in equity, according to their true dates, independent of any notice either actual or constructive."

The facts in the case at bar are that the departmental oil and gas mining lease was executed and delivered to the appellant by George Franklin Berryhill and Clementine Berryhill on the 24th day of March, A. D. 1906, and that the deed of conveyance to Perry McKay and Edmond McKay was executed and delivered to them by George Berryhill some two months subsequent, on June 5, 1906; and that all other conveyances and assignments affecting the land in controversy were made subsequent to June 5, 1906. That being so, the execution and delivery of the oil and gas mining lease to appellant having been prior in point of time, it takes priority independent of any question of actual or constructive notice, and vests in the appellant absolute right to the oil and gas under the land in question.

The appellees insist that the oil and gas mining lease under which this appellant claims was not a lease until approved by the Secretary of the Interior; that it was a mere offer on the part of the lessor, subject to rescission at any time, before approval by the Secretary of the Interior, and that the deed executed on June 5, 1906, by appellant's lessor, George Franklin Berryhill, to the appellees, Edmond McKay and Perry McKay, acted as a rescission of the offer and destroyed all the rights of the appellant under the lease.

The fallacies of this contention are, we submit, both apparent and real. The record discloses that the appellant

paid to his lessor, George Franklin Berryhill, a valuable consideration for the lease. No offer of a return of this consideration has ever been made. Also the record discloses the fact that appellant's lessor, at the time of the execution and delivery of the deed to the McKays, disclosed to the McKays the fact that there was some kind of a lease on the lands. But aside from this latter fact, the rights of the lessor, George Franklin Berryhill, and the rights of the lessee, Albert W. Shulthis, were fixed when the lease was executed and delivered. The Secretary of the Interior in the year 1906, had no authority to make oil and gas mining leases on the lands of citizens of the Creek Nation; this fact will not be controverted. He had that authority under the Act of Congress approved June 28, 1898, but the right was denied to him under the provisions of the "Supplemental Creek Agreement," approved June 30, 1902. Section 13, of the Act approved June 28, 1898 (30 Stat. L., 495), provides:

> "That the Secretary of the Interior is hereby authorized and directed from time to time to provide rules and regulations in regard to the leasing of *oil,* coal, asphalt and other minerals in said Territory, *and all such leases shall be made by the Secretary of the Interior;* and any lease for any such minerals otherwise made shall be absolutely void * * * "

Section 17 of the "Supplemental Creek Agreement," approved by Congress June 30, 1902, and thereafter ratified by the Creek Nation, provides (32 Stat. L., 500):

> "Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a longer period than one year for grazing purposes and for a period longer than five years for agricultural purposes, *and leases for mineral*

*purposes may also be made with the approval of the Secretary of the Interior and not otherwise * * * "*

Under the first of these quoted sections the Secretary was the lessor; under the latter, the allottee.

The lease in question was made by George Franklin Berryhill pursuant to the terms of this latter section, and in accordance with the rules and regulations of the Secretary of the Interior promulgated under the authority of this section.

The operation of the lease was held in abeyance until the approval of the lease by the Secretary of the Interior; but the rights and liabilities of the parties became fixed from the time of the execution and delivery of the lease. The lessee could not go on the lands and drill for oil until both lease and bond were approved. Neither could he be called upon, under the then existing regulations, to pay the rentals reserved in the lease until the lease and bond were approved.

The rules and regulations under which the lease under consideration was executed, made the United States Indian Agent, at Muskogee, the agent of the lessor, to receive all rents and royalties reserved to the lessor under the lease, and pursuant to the said rules and regulations the lessee paid to the Indian Agent all rentals as the same were required to be paid.

Appellees would urge that the appellant could have no rights under his lease until the approval of the same by the Secretary of the Interior; that then he must invoke the doctrine of relation to have his lease effective as of the date on which it was executed and delivered. We assert with confidence that the doctrine of relation has no place in the present controversy.

The rights and liabilities of the parties to the lease became fixed from the time of execution and delivery, and the

passing of the consideration; the operation of the lease alone was held in abeyance until the approval of the Secretary of the Interior; and the appellees acquired their rights, if any they have, subject to the right and title of the appellant.

This proposition has been squarely passed on by the Circuit Court of Appeals for the Eighth Circuit in the case of *Midland Oil Co. v. Turner*, 179 Fed. Rep., 74.

The treaty between the United States and the Cherokee Nation, approved by Act of Congress of July 1, 1902 (32 Stat. L., 716), provided that leases for mineral purposes could be made with the approval of the Secretary of the Interior and not otherwise, and in considering an oil and gas lease on restricted lands of a Cherokee Indian, that Court said:

> "The power of the Secretary of the Interior with respect to oil and gas leases of Cherokee allottees was that of approval or disapproval. He could veto, but could not initiate or make a lease. He might refuse to approve because of the presence of a provision, and thereby render the lease ineffective."

(B) Irrespective of the foregoing Proposition "A" the appellees are charged with notice of the execution of the oil and gas mining lease of this appellant, and under the facts disclosed by the evidence, cannot be held to be bona fide purchasers without notice of this appellant's lease.

Irrespective of whether or not the Act of Congress known as the "Recording Act," approved February 19, 1903, was applicable to oil and gas mining leases on lands from which restrictions against alienation had not been removed, and which required the approval of the Secretary of the Interior, still the appellees, and each of them, under the evidence in the record, must be held to have taken whatever interest or interests they may have in the lands

in controversy with full knowledge and notice of the oil and gas mining lease executed March 24, 1906, by George Franklin Berryhill to this appellant, Albert W. Shulthis. And the appellees taking their interest with full knowledge and notice of this appellant's oil and gas mining lease cannot be held to be *bona fide* purchasers without notice.

> "The doctrine of *bona fide* purchaser, in its most general form, is that a purchaser in good faith for a valuable consideration and without notice of the prior adverse claims, is protected against certain suits brought by the holders of suit claims.
>
> "The essential elements which constitute a *bona fide* purchase are, therefore, three: *a valuable consideration, the absence of notice, and the presence of good faith.*"
>
> Pomeroy's Equity Jurisprudence, Vol. II, Sec. 1745.
>
> "The doctrine of notice as affecting the priority of encumbrances arises from the equitable view that it is fraud in one who has notice of an adverse claim in another to attempt to acquire a title to the prejudice of the interest of which he has been made aware."
>
> Jones on Mortgages, 543.

The appellees cannot be heard to say that they are *bona fide* purchasers in good faith, for under the authority of the cases of *Caha* v. *United States*, 152 U. S. 222, and *United States* v. *Bailey*, 9 Peters (U. S.), 273, cited and referred to in the discussion of Proposition "A," the rules and regulations of the Department of the Interior are so much laws of the United States that a conviction for crime will be sustained for the violation of the said rules and regulations. As hereinbefore observed, it must be clear that if the rules and regulations of the Department of the Interior are sufficiently laws of the United States, for the violation of which a person may be deprived of his life and liberty, that the rules and regulations of the Depart-

ment of the Interior promulgated under Section 17 of the Act approved June 30, 1902, governing mineral leases on the lands of allottees of the Five Civilized Tribes are sufficiently laws of the United States upon which right of property may be based and determined.

Section 16 of the regulations concerning oil and gas mining leases is as follows:

> "All leases which require the approval of the Secretary of the Interior must be submitted to the Indian agent, Union Agency, for transmittal within 30 days from and after the date of the execution of the lease. No such lease presented after the time herein designated will be received by the agent or transmitted to the department, or be regarded as having any effect whatever." (Printed record, p. 319.)

Section 4 of the rules and regulations of the Department of the Interior, in force in the Indian Territory during the time of all transfers in this case contains the following:

> "All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the agent, Union Agency, one to be delivered to the lessee and one to the lessor." (Printed record, p. 315.)

Being laws of the United States, the following is applicable:

> "It is a general rule of law, founded upon public policy, that all persons must take notice of the public laws by which they are governed. Consequently, all persons interested in transactions made pursuant to a public statute are chargeable with notice of all that the law contains."
>
> Am. and Eng. Encyc. of Law, Vol. 21, 588.

In addition, it will appear from the testimony of the witnesses, Jessie I. Gillespie (Pr. Tr., 121), Frank A. Gil-

lespie (Pr. Tr., 106), J. H. Winemiller (Pr. Tr., 126), A. W. Shulthis (Pr. Tr., 97), J. A. Hull (Pr. Tr., 129), and E. R. Kemp (Pr. Tr., 130), that the substance and contents of the rules and regulations of the Secretary of the Interior, relating to the taking, filing and perfecting of oil and gas mining leases on lands in the Creek Nation were for the past several years a matter of common knowledge, and that it was the general custom of oil operators taking leases in the Creek Nation to file their leases with the Indian Agency soon after they were executed.

The testimony of the witness, Jessie L. Gillespie (Pr. Tr., 121), on this point, is as follows:

> "The Secretary's rules and regulations have been the subject of much discussion among oil men during the last two years. The substance of the rules and regulations of the Secretary of the Interior regarding the taking and filing of oil and gas leases in the Creek Nation was a matter of common knowledge among the oil operators of the Indian Territory."
>
> "It was a matter of common knowledge among the oil operators doing business in Indian Territory that a record of oil and gas leases was kept and maintained in the office of the United States Indian Agent.
>
> "It was the general custom of oil operators taking leases in the Creek Nation to file the leases with the Indian Agency soon after they were executed. It was necessary so to do."

The testimony of the other witnesses named is substantially that of Jessie I. Gillespie.

> "Evidence of the general nortoriety of the particular fact has been held to be admissible for the purpose of proving notice, inasmuch as it is a circumstance tending to prove the party's knowledge."
>
> 21 Am. and Eng. Encyc., p. 586.

In this contention, the language of the Commissioner

of Indian Affairs used in his opinion of January 3, 1907, hereinbefore referred to, is significant wherein he said:

> "When the Secretary of the Interior issued regulations providing that leases should be filed with the Indian Agent at Union Agency, and took steps to give the contents of these regulations the widest publicity, he placed upon the parties dealing with these Indian lands, the duty of investigating, not only the records of the United States clerks, who are ex-officio recorders, but the records of the Indian Agent at Union Agency, as well, if they wished to ascertain the true status of the land.
>
> "Persons buying land from citizens or freedmen of the Cherokee or Creek Nations are charged with knowledge of the fact that there may be in existence, affecting the lands which are not filed with the ex-officio recorder, but which may have been filed with the Indian Agent at Union Agency."

The foregoing is applicable to all the appellees and different assignees in this case in that it places upon them the knowledge that in the Indian Territory all oil and gas mining leases are filed with the United States Indian Agent at Union Agency, Muskogee. The record shows throughout that practically all oil and gas mining leases were necessarily taken upon departmental forms, and necessarily filed with the Indian Agent for approval.

Independent of the foregoing, however, it is apparent from the record of the evidence in this case that each of the appellees had knowledge and information of such facts or circumstances which were sufficient to put him upon inquiry and which were of such a nature that the inquiry, if prosecuted with reasonable diligence, would certainly have led to a discovery of the oil and gas mining lease of appellant; and that the appellees either did not prosecute the inquiry at all, or, if they did so, did so with carelessness, negligence and general want of reasonable effort; in both of

which cases the inference of actual notice to the appellees of appellant's lease is necessary and absolute.

The first conveyance subsequent to the execution and delivery of the departmental oil and gas mining lease to the complainant is the warranty deed executed and delivered by George Franklin Berryhill and Clementine Berryhill to the appellees, Edmond McKay and Perry McKay, on the 5th day of June, A. D., 1905.

The record of the evidence in this case concerning this transfer shows:

From the testimony of the grantor, GEORGE FRANKLIN BERRYHILL (page 111, Pr. Tr.):

Direct Examination:

> Q. At the time of the execution of that deed, did you or did you not advise them that there was an oil and gas lease on the land in controversy in this suit? A. Yes, sir, I did.

Cross Examination (Pr. Tr., 114):

> Q. Just go ahead and tell what you told them at the time you had this trade. A. Well I told them they had an oil and gas lease on it, and at the time I didn't believe it was any good, and I believe that was all.
>
> Q. Did you tell them who took that lease? A. Told them who had it?
>
> Q. Who did you tell them? A. McElwane and Chaney.
>
> Q. Did you know what kind of a lease it was? A. Supposed to be an oil and gas lease.
>
> Q. Well, when you told them that there had been an oil and gas lease made on it by you and that you didn't believe it was any good, they then told you they would have to investigate the record before they would pay the rest of the consideration, didn't they? A. They told me they had to get an abstract.

From the testimony of EDMOND MCKAY, the grantee (Pr. Tr., 171):

Q. How long have you resided in the Indian Territory? A. Since 1894.

Q. Now, I will ask you to state what inquiry, if any, you made from George Franklin Berryhill, in regard to the title to this 40 acres, in respect to encumbrances or any leases? A. Well, after we had talked to him about the deal and he had made the price on this land, we asked him if there—asked him—I asked him if there was anything against this land, if he had made any kind of a deal on this land.

Q. Any kind of a deal? A. If he had signed any papers, and he said, no, he hadn't, only he had signed an old lease some time ago, but it wasn't any good; he said he knew, because the parties he had signed this lease to had come back after him and wanted him to sign up new papers.

Q. Did he say what kind of new papers the parties had come back and requested him to sign? A. He said that they said that these papers had been signed up on the wrong forms, or something of that kind. The wrong papers. There was a mistake, and they wanted to correct it, and that he hadn't corrected it; that he hadn't done anything, and he knew that this wasn't against the land now, because he hadn't signed nothing more.

Q. Now, did he tell you to whom he had signed any old leases or any prior papers in regard to this land, or against this land? A. He did not know who it was to.

* * * * * *

Q. Did George Franklin Berryhill tell you at the time you negotiated for the purchase of this land or at any time in the month of June, 1906, that he had made any lease to the plaintiff, Albert W. Shulthis? A. No, sir, he didn't.

Q. Did George Franklin Berryhill, at any time during the negotiations for the purchase of this land,

or at any time during the month of June, 1906, tell you he had made a lease for oil and gas purposes to a man by the name of McElwane? A. No, sir; he didn't.

Q. Tell whether or not there was anything said by George Franklin Berryhill at the time you bought this land, accepted the deed therefor, and paid the consideration, in regard to a departmental oil and gas lease having been formerly made to anybody? A. There was certainly nothing said about any department lease.

* * * * * *

Q. How did it happen that you and your brother didn't pay the whole two thousand dollars consideration at the time the deed was made? A. We told him —after he said, intimated there might be something against this land, by telling us about once giving some kind of papers—signed some kind of papers, we told him we would have an abstract made, and we would see whether there was anything against this land or not.

Q. Did you have an abstract made? A. Yes, sir.

Q. Now, was there anything in that abstract showing or indicating that there was any lease on this land, for oil and gas purposes? A. There was not.

Q. Was there anything in that abstract showing that Shulthis had a lease? A. No, sir.

Q. Now, when did you pay the balance of the consideration, the sixteen hundred dollars? A. On the 13th day of that month—after we got the abstract.

Q. At the time you bought this land from George Franklin Berryhill, accepted this deed, and paid the entire consideration, tell whether or not you had any notice, or any knowledge or any information that there was outstanding a departmental oil and gas lease against this land, formerly executed by George Franklin Berryhill and Clementine Berryhill? A. No, sir; we had no knowledge of it.

Cross Examination.

I made no inquiries at all at the Indian Agency as

to whether or not there was an oil and gas mining lease on this land at the time of the execution and delivery of the deed of George Franklin Berryhill and Clementine Berryhill to me and Perry McKay.

I had never given the matter of filing departmental lease at the Indian Agency any thought. We were not taking leases and had never given it any thought.

* * * * *

I was at Tulsa when there was a hearing on a contest over the leases on this land.

My brother made the statement before W. D. Ford: "Mr. Berryhill told us he had given some kind of a lease and that they had come back to get new papers just a few days before we bought the land, and that he didn't sign these papers."

Re-Direct Examination.

George Franklin Berryhill did not say that the lease he had executed was an oil and gas lease. He didn't say anything about what kind of a lease he referred to as having formerly (been) executed.

Neither my brother nor myself ever operated for oil and gas in the Creek Nation or in the Indian Territory. We had never taken any leases on departmental forms. We never had occasion to investigate the rules and regulations of the Secretary of the Interior in regard to the leasing of lands in Indian Territory for oil and gas mining purposes. We did not know anything about them. We did not know at the time we bought this land that a party in order to get the approval of the Secretary of the Interior to an oil and gas lease upon allotted lands in Indian Territory had to file that lease first with the Indian Agent at Muskogee.

Re-Cross Examination.

I heard of the secretary's rules and regulations prior to the 5th day of June, 1906, but had never given them any thought or read them with a view of doing any business.

The testimony of appellee, Perry McKay (Pr. Tr., 180), is substantially that of his brother, the appellee, Edmond McKay, and it would serve no good purpose to review it here. It corroborates in practically every particular that of Edmond McKay.

It will be noted from the certificate to the abstract obtained by the McKays (Pr. Tr., p. 215), that no reference is made to the records in the United States Indian Agency, Union Agency, at Muskogee.

From the testimony above referred to, the conclusion is irresistible that at the time of the negotiations between George Franklin Berryhill and the McKays, that George Franklin Berryhill told the McKays that he had in fact given a lease upon the land in question—but that he had given it to one McElwane and to one Chaney. It further appears in this case,

From the testimony of the appellant (Pr. Tr., 100):

Cross Examination.

> Q. Who represented you in the taking of that lease? A. John Chaney at Sapulpa;

and from the testimony of same witness (Pr. Tr., 102):

> "I sent Mr. McElwane down from Independence as my representative to take leases for me on lands in certain localities;"

and from testimony of Eugene McElwane (Pr. Tr., 149):

> "I was present on March 24th, 1906, when George Franklin Berryhill signed and executed an oil and gas lease to Albert W. Shulthis covering the land in controversy;"

and from the testimony of John Chaney (Pr. Tr., 139):

> "I was present on the 24th day of March, A. D., 1906, when George Franklin Berryhill and Clementine Berryhill executed an oil and gas lease on the land in controversy;"

and from the testimony of the same witness (Pr. Tr., 142):

> "Myself and Mr. McElwane were acting as agents for Mr. Shulthis in getting this lease;"

and from the testimony of the witness McElwane (re-called, Pr. Tr., 143):

> "I was the agent for Mr. Shulthis in the taking of that lease;"

that the Chaney and the McElwane referred to were each agents of the appellant.

The testimony of both Edmond McKay and Perry McKay is strangely silent as to whether or not either or both of them took occasion to ascertain from either Mr. Chaney or from Mr. McElwane the knowledge concerning the lease which the McKays knew they had. Having once been fastened with the knowledge that Mr. Chaney and Mr. McElwane were familiar with the entire transaction between the appellant, Shulthis, and George Franklin Berryhill, it was incumbent upon the McKays to prove their good faith in seeking out the information possessed by both Chaney and McElwane. This they have not done. The fact remains, however, that had they interviewed either Mr. Chaney or Mr. McElwane concerning the lease transaction, they could have learned the entire status of the title to the land which they were purchasing.

They had the statement from the grantor, Berryhill, to the effect that he gave some "papers" to Chaney and McElwane. Why did the McKays not seek of Chaney and McElwane the information they possessed, which beyond a doubt would have brought to them direct information of the lease of appellant covering the land in controversy?

In reference to this phase of the question, Mr. Warvelle in his excellent work on "Vendors," Vol. 1, at page 266, aptly says:

"The doctrine of actual notice implied by circumstances necessarily involves the rule that a purchaser before buying should clear up the doubts which apparently hang upon the title by making due inquiry and investigation, using ordinary caution to make further inquiries, and if he avoids the inquiry, he is chargeable with notice of the facts which by ordinary diligence he would have ascertained; he has no right to shut his eyes to the light before him; and if he does so it may well be concluded that he is avoiding notice of which he in reality believes or knows."

Or as stated in Vol. 21, Am. and Eng. Encyc. of Law, page 355:

"Where such facts or circumstances are known to a person in relation to a matter in which he is interested as are sufficient to make it his duty as an honest and prudent man to inquire concerning the rights of other persons in the same matter, and the course of inquiry thus suggested would, if followed with due diligence, lead to a discovery of rights in conflict with his own, the general rule is that he will be held chargeable with notice of all that he might thus have discovered, and will not be heard to say that he did not actually know of the fact or claim in question.

Means of knowledge with the duty of using them are deemed equivalent to knowledge itself, and passive good faith will not serve to excuse wilful ignorance."

In *Williamson* v. *Brown*, 15 N. Y., 355, the court said:

"In all cases where the question of implied notice of a prior unrecorded mortgage or conveyance arises as a question of fact to be determined, the court must decide whether the information possessed by the party would, if it had been followed up *by proper examination*, have led to a discovery of said mortgage or conveyance."

And

"What is sufficient to put a purchaser upon in-

quiry, and to affect him with the facts which the inquiry might lead to, it is difficult to state in the form of a rule universally applicable. In each case it must be determined whether the facts and circumstances disclosed are such as to charge the conscience of the purchaser with the duty of following up the inquiry."

Jones on Mortgages, 547.

In this case, then, it must be determined whether or not from the facts disclosed to the McKays by George Franklin Berryhill at the time of the negotiations for the conveyance of the land, the burden devolved upon the McKays that, before buying, they should clear up the doubts which apparently hung upon the title by making due inquiry and investigation, using ordinary caution to make further inquiries.

It is perfectly plain from the testimony of the witness above that there did occur some doubt in the minds of the McKays concerning the title, else why did they refuse to close the transaction at once? Why did they take several days to make inquiry, and obtain an abstract? We take it that the McKays had sufficient information to put them upon inquiry.

Furthermore, the record shows, from the testimony of Edmond McKay (Pr. Tr., 171), and from the testimony of Perry McKay (Pr. Tr., 181), that they had resided continuously in the Indian Territory some thirteen or fourteen years, and that they had heard of the secretary's rules and regulations prior to the 5th of June, A. D., 1906, but had never given them any thought or read them with a view of doing any business.

The record of the evidence in this case further shows:

From the testimony of Edmond McKay (Pr. Tr., 157):

"I did not make inquiry at all at the Indian Agency as to whether or not there was an oil and gas lease on the land at the time of the execution and delivery of the

deed of George Franklin Berryhill and Clementine Berryhill to me and Perry McKay;"

From the testimony of Perry McKay (Pr. Tr., 184):

"Prior to the time of the execution of this deed from George Franklin Berryhill and Clementine Berryhill to me and my brother, Edmond McKay, we made no inquiries at the Indian Agency as to whether or not there was pending an oil and gas lease covering the lands in controversy."

It further appears from the record in this case:

From the testimony of J. I. E. Brasel (Pr. Tr., 188):

"I am a clerk in the oil and gas lease division of the Union Indian Agency at Muskogee. My duties were to keep a record of the leases on the dockets and give out public information. Prior to March 1, 1907, if an inquirer would give me the description of a piece of land in either the Creek or Cherokee division—that is, give me the subdivision of the section and the township, and also the range numbers, and ask me whether or not there was a lease on that land, I would have told him that I could not give it to him in that way. I would have to have the name of the allottee—the name of the lessor. I would voluntarily tell him he would have to know the name of the lessor, and I would inform him so right then. Whenever an inquirer came into the lease division and would give me the name of the lessor I would always tell him whether or not there was a lease on the party's land or not, or any part of it."

The testimony of Benjamin Moss (Pr. Tr., 191), and that of W. D. Ford (Pr. Tr., 196), amplifies that of the witness Brasel, and it would serve no good purpose to set it out here in full.

The final summary, then, is that the McKays at the time of the negotiations for the deed of conveyance of this land were informed by the grantor that he had given "some papers" on this land to Chaney and McElwane; that Chaney

and McElwane were agents of the appellant in obtaining the lease in question, and were thoroughly conversant with all the details of the transaction; that had the McKays sought out Chaney and McElwane, they could have been fully informed of the existence of the lease of appellant; that from the information given to the McKays at the time of the negotiations, the McKays were put upon inquiry—that they had doubt in their minds as to the state of the title; that having such information and having such doubt in their minds, they did make an inquiry, such as it was, but they failed to make the inquiry along the channels known to them which would best enlighten them.

In addition, it appears that the rules and regulations of the Department of the Interior required all leases to be filed with the Indian Agent, but that neither of the McKays made inquiry at the Indian Agency as to whether or not there was in fact any lease upon the land.

The record also shows that had the McKays, in pursuance of knowledge of the rules and regulations of the Department of the Interior (which they must be held to have had), had prosecuted their inquiry to the extent of inquiring of the Indian Agent's office concerning the status of the land in controversy, they could have been informed of the lease to the complainant, for it appears from the record (Pr. Tr., 203, Agreed Statement of Facts):

> "That on the 21st day of April, A. D., 1906, said lease was filed in the office of the United States Indian

Agent at Union Agency, Muskogee, Indian Territory," and from the testimony of the witnesses, Brasel, Ford and Mossman, that inquiries were always answered concerning the status of lands and information given.

It would seem that the McKays diligently avoided the very and only avenues of obtaining knowledge of the status of this land which they were purchasing, making a sem-

blance of inquiry at the very places where none could be obtained.

They would apparently have us believe that they were but uneducated farmers and therefore not conversant with the situation relative to restricted lands in the Creek Nation. However, their testimony discloses that they knew that the lands in controversy were restricted lands at the time of the execution of the oil and gas mining lease to this appellant, and they were sufficiently abreast of the times to ascertain whether Congress had passed any legislation affecting the restrictions on alienation of Indian lands, and deeming themselves sufficiently advised as to the provisions of the Act of Congress approved April 26, 1906, took a chance under the Berryhill title by purchasing it on June 5th, 1906.

Pomeroy, in his work on "Equity Jurisprudence," Vol. II, page 597, states the rules applicable to these facts, as follows:

> "If it appears that the party obtains knowledge or information of such facts which are sufficient to put a prudent man upon inquiry, and which are of such nature that the inquiry *if prosecuted with reasonable diligence would certainly lead to a discovery of the conflicting claim*, then the inference that he acquired the information constituting actual notice is necessary and absolute; for this is only another mode of stating that the party was put upon inquiry; that he made the inquiry and arrived at the truth.
>
> "If it appears that the party has knowledge of such facts sufficient to put a prudent man upon inquiry and that he wholly neglects to make any inquiry, *or having begun it fails to prosecute it in a reasonable manner*, then also the inference of actual notice is necessary and absolute.
>
> "These propositions embrace all instances of actual notice proved by circumstantial evidence, each depending upon its own particular circumstances."

And Jones in his work on Mortgages, Vol. 1, 553, states it thus:

> "If a purchaser put upon inquiry fails to prosecute it with due diligence, he is conclusively presumed to have notice of the facts that a due inquiry would have disclosed. When it is shown that a purchaser had knowledge of facts sufficient to put him on inquiry as to the existence of some right or title in conflict with the title or interest he is about to purchase, he is presumed to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. He is chargeable with notice of all facts that he might have learned by the exercise of reasonable diligence prosecuting the inquiry in the right direction.
>
> "A purchaser put upon inquiry may rebut the presumption of notice by showing that he made due investigation without discovering the prior right or title he was bound to investigate. The question whether he has made due inquiry is one of fact to be investigated by the jury."

The question really resolves itself into one of good faith on the part of the McKays. It does seem that a reasonably prudent man would have ascertained from the avenues opened to him the condition of the land he seeks to purchase; and when he has failed so to do, the question of imputable notice of facts he might have ascertained upon a reasonably diligent inquiry, involves the question of good faith, an essential element of a *bona fide* purchase.

As said in *Bowman* v. *Metzger*, 39 Pac., 4 (Oregon, 1895):

> "The current of judicial authority, both in England and the United States, has narrowed the inquiry and practically limited it to the single question whether the purchase had been made in good or bad faith.
>
> "If a person is grossly negligent in the exercise of

common prudence this is a fact competent to go to the jury as evidence of bad faith; but the jury must pass upon the question whether the purchaser has acted honestly.

"If a person purposely refrains from making inquiry lest he should become possessed of knowledge of infirmities in the title to the property which he is about to purchase, this is a fact to go to the jury touching his good faith in the purchase.

"Good faith cannot be predicated upon want of knowledge resulting from the omission of a plain duty.

"A man cannot shut his eyes to the light of day, and say he is without knowledge that the sun is shining."

See also *Randall* v. *Lingwall*, 73 Pac., 1, and the case of *The Connecticut Mutual Life Ins. Co. v. Smith*, 117 Mo., 261, where the court aptly remarks:

"Courts of equity, since their earliest foundation, have always recognized that still small voice of suggestion, emanating from conscience, and provocative of inquiry, is as potent to impart notice as of presidential proclamation, or an army of banners."

Or in the case of *Oliver* v. *Sanborn* (Mich., 1886), 27 N. W., 530:

"Good faith is not less important than the payment of value, and is not to be determined alone upon the testimony of the party, that he acted in good faith; but he must show from the inception to the conclusion of the transaction he had no notice or knowledge that could affect his conscience, or render it inequitable for him to make the purchase.

"He is chargeable with notice, not only where the evidence raises the presumption that he knew, but where there is ground for inferring that reasonable diligence would have lead to a discovery of the truth.

"One who wilfully remains ignorant where the right of a third person is concerned is as much in default as if he had the knowledge which he avoids. The question, therefore, is not merely did the 'plaintiff' know, but had he sufficient information to render it his duty to inquire, and would an investigation, in the ordinary course of business have led to the discovery of 'the title claimed by the opposite party.'

"A person cannot be an innocent purchaser of land which his grantor informs him has been already conveyed to him by another person."

The case of *Pure* v. *McDonald* (Md., 1851), 54 Am. Dec., 660, is very much like the case at bar. In that case it was said:

"The second objection is one of more difficulty and will require some examination. It involves the question whether Folek had notice of the prior equity of McGuire. On this subject the authorities are not uniform.

"We find it admitted, that after the sale, but before the payment of the purchase money, Folek was informed of the existence of the deed of trust by McDonald, but immediately following that information McDonald declared that the money intended to be secured by the deed had been fully paid. Did the accompanying information as to the payment of the money release Folek from the necessity of making further inquiry to the truth of that matter?

"Can it be supposed that a man of ordinary prudence would have made the purchase under these circumstances, without obtaining more satisfactory information? There is not a word about having any receipts for the money, nor is there any excuse or reason assigned for not having them. * * *

(Discussion.)

"We concede it to be true, as stated, that McDonald did inform Folek that the money secured by the deed of trust was fully paid, and that there was no

claim against the land for any money due and unpaid under said deed. * * *

"Failing to make proper inquiry, he was guilty of negligence to a degree which must charge him with notice of the lien and of its existence; especially as he was informed that the deed was designed to create an encumbrance upon the very land he was about to purchase."

In the case of *Williamson* v. *Brown*, 15 N. Y., 354, the Court held that where a purchaser has knowledge of any facts sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed either to have made inquiries and ascertained the extent of such prior right or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser. The Court cites with approval the English case of *Whitbread* v. *Boulnois*, I You and Coll. Ex. R., 303, as follows:

"The plaintiff was a London brewer and supplied one Jordon, who was a publican, with beer. It was the common practice among brewers in London to lend money to publicans whom they supplied with beer, upon the deposit of their title deeds. Jordan had deposited certain title deeds in accordance with this custom. He afterwards gave Boulnois, a wine merchant, a mortgage upon the property covered by the deeds deposited. The mortgage was recorded. Boulnois had notice of this custom existing among brewers and publicans, but he made no inquiry of the brewer. The suit was brought to enforce the equitable mortgage arising from the deposit of the deeds.

"Baron ALDERSON held that notice to Boulnois was sufficient to make it his duty to inquire as to the existence of the deposit. That his not doing so was evidence of bad faith, and the plaintiff's rights under his equitable mortgage were sustained."

The rule was laid down as follows:

> "When a party having knowledge of such facts as would lead an honest man, using ordinary caution, to make further inquiries, does not make, but on the contrary studiously avoids making such obvious inquiries, he must be taken to have notice of those facts, which if he had used such ordinary diligence he would readily have ascertained."

In view of the facts and circumstances in this case, under the law, we respectfully insist that Edmond McKay and Perry McKay cannot be held to be *bona fide* purchasers, but, on the contrary, must be held to have taken title to the land in controversy subject to the oil and gas mining lease of the appellant.

The next transfer with which we have to deal is that of the commercial oil and gas mining lease of the land in controversy executed and delivered by the appellees, McKays, to Arthur B. Reese on October 12, 1906.

It appears from the testimony of Arthur B. Reese (Pr. Tr., 136):

> "I did not personally negotiate for the lease. Josiah G. Davis represented me in the procuring of that lease. I had nothing personally to do with the taking of that lease. I trusted entirely to Josiah G. Davis to represent me in that transaction."

(Pr. Tr., 137):

> "At the time this lease was taken I asked Mr. Davis if he was sure the title was good, and he said he was, and he showed me a letter at that time that he had received from an abstractor, stating that there was no lease of record at Sapulpa, or at the Indian Agent's office. That is the only interest I had in regard to the title. Mr. Davis merely stated that it was his opinion that the title was clear."

From the testimony of Josiah G. Davis (Pr. Tr., 149):

"I represented Arthur B. Reese as attorney on October 12, 1906, in obtaining the lease to him from the McKays upon the land in controversy."

(Pr. Tr., 154):

"I knew at this time that most of the oil and gas leases taken on lands in the Creek Nation were filed in the office of the Indian Agent."

(Pr. Tr., 151):

"In instituting an investigation as to the title, I procured H. H. Adams, an abstractor. I communicated with Adams by long distance telephone. He communicated with me by long distance. I gave Adams instructions about investigating the title with respect to departmental oil and gas leases. He made a report in regard to that by long distance telephone. He later sent me a written certificate."

(The written certificate is set out at page 216, Pr. Tr., and is as follows:

"C. H. Bigelow, President. A. W. Perry, Secretary.
W. S. Timberlake, Treasurer. F. R. Bigelow, Asst. Secretary.

Saint Paul Fire and Marine Insurance Company.
Assets over $4,000,000.

Adams & Watchorn, Agents.

Sapulpa, Ind. Ter., October 13, 1906.

Mr. J. G. Davis, Cashier, Mounds, I. T.

DEAR JOE: Your 9th reached me this morning with mailing date of the 12th relative to the NE ¼ of NW ¼ 18-17-12.

In reply beg to state that there is no record of an oil and gas lease on the land described either in departmental form or otherwise, up to the date of writing, 11:30 a. m.

Very truly,

H. H. ADAMS, *Abstractor.*

You were correct about the vested title: Edmond and Perry McKay.")

(Pr. Tr., 154):

"All I did was call up Mr. Adams by long distance 'phone and ask him to look this up, and he then called up the agent by long distance 'phone and he advised me the result by long distance 'phone."

It appears from the testimony of the same witness (Pr. Tr., 152):

"It was agreed before the lease was taken that Mr. Reese was to have four-eighths, Mr. Harmon three-eighths and myself one-eighth. The assignments made on the back to myself and Arthur B. Reese were made in accordance therewith."

It appears, therefore, that Mr. Davis acted as the agent of Mr. Reese, Mr. Harmon and also for himself.

Acting as such agent, he instructed H. H. Adams to make an investigation. It appears from the testimony of Adams (Pr. Tr., 144):

"At the request of Josiah G. Davis, I made an investigation as to the title to the land in question. I called up Mr. W. D. Ford at the Indian Agency, and asked him to report to me whether there was a lease filed covering this particular tract of land. Mr. Ford was in charge of the Indian lease department. I had a conversation with some one in the office and he reported that there was no lease filed."

Cross Examination (Pr. Tr., 146):

"I asked for a report on this particular tract of land as to whether or not there was a departmental lease on file. I just described the land. I didn't give any names."

We have from the record, then, in reference to the lease executed and delivered by the McKays to A. B. Reese, that

Reese took the lease in his name as trustee for Davis and Harmon; that Davis acted as agent for both Reese and Harmon, and also in his own right; that Reese was an oil and gas mining speculator; that Reese had a fair knowledge of the rules and regulations of the Secretary of the Interior relative to taking, filing and perfecting of leases on the lands in the Creek Nation, and that he knew that departmental oil and gas mining leases had to be filed with the Indian Agent within thirty days of the time of the taking of the lease; that nothwithstanding that knowledge, he personally made no investigation as to the title of the land in controversy; that he intrusted the entire matter to Josiah G. Davis. The record establishes the fact that Josiah G. Davis himself knew that departmental oil and gas mining leases were filed in the office of the Indian Agent.

It also appears from the record:

From the testimony of George B. Harmon (Pr. Tr., 164):

> "I am an oil producer at Mounds. I first took leases in October, 1906."

It appears from the record of the testimony, then, that Josiah G. Davis, as the agent for Reese and Harmon—to whom Reese and Harmon both testified the entire matter had been left—from his knowledge of the rules and regulations of the Department of the Interior, and of the facts that oil and gas mining leases were filed with the Indian Agent, Union Agency, had knowledge or information of sufficient facts to put him upon inquiry, for he directed his sub-agent, Adams, to make an investigation of the records of the office of the Indian Agent. Davis testified, as also did Reese, that he knew oil and gas mining leases were necessarily filed with the Indian Agent at the time he took the lease, and from that knowledge Davis directed Adams to make an investigation. The law is, that if it appears that the party

had knowledge of such facts sufficient to put a prudent man upon inquiry, and he, having begun it, fails to prosecute it in a reasonable manner, then the inference of actual notice is necessary and absolute.

Weigel v. *Green,* 218 Ill., 223.

The evidence is conclusive upon the fact that the investigation was actually begun. The question now is, was the investigation, already begun, prosecuted in a reasonable manner?

The facts are that Davis, over the long distance telephone, instructed Adams to investigate the records at the Indian Agency, and that Adams in turn, over the long distance telephone, communicated with the Indian Agency. Upon the question of fact, however, as to whether or not Adams did actually communicate with the Indian Agency there is to our mind considerable conflict in the record.

Adams says that he called up the Agency and asked them to report as to whether or not there was a lease filed covering this particular tract of land. "I just described the land. I didn't give any names."

Ford, with whom Adams alleges he held the telephone conversation, testifies he could not give a man any information where the land was described only—that the indices are all indexed with the allottees' names, and that if Adams had called him over the 'phone as he testifies, and made the request for information in the form that he testified he did, he would have told him that it was impossible, "that I couldn't give him any information unless he could give me the name of the allottee."

Adams testified that he did not give the allottee's name.

However, conceding that Adams did actually call up the Indian Agency at Muskogee by long distance telephone, it seems he adopted the one mode of examination which would not afford him the knowledge he sought. Then, too, he

himself made no investigation of the records, but relied upon the statements of a third party over the long distance telephone. Can it be said that the investigation was pursued with the degree of care and diligence required by law? To our minds, it was not. If it was not, the inference of actual knowledge is necessary and absolute.

That notice to a principal is implied from notice to an agent needs but the stating of the rule. Jones, in his work on Mortgages, at Sec. 560, states it thus:

> "When an agent acquires a knowledge of any matters or instruments affecting the title of any lands, about the purchase or matters of which he is employed, and this knowledge is such that it is his duty to communicate it to his principal, the law imputes this knowledge to the principal; or in other words, notice to the principal of such matters or instruments is implied."

Having had knowledge of facts sufficient to put them on inquiry as to the existence of some right or title in conflict with the title or interest they were about to purchase, they are charged with notice of all facts that they might have learned by the exercise of reasonable diligence, prosecuting the inquiry in the right direction.

Reese, Davis, Harmon and Adams all knew the name of the allottee of the land they were seeking to purchase. Had any one in person—or had Davis, as agent, or Adams, presented themselves in person in the Indian Agent's office and made inquiry as Adams did—that is, by merely describing the land—they would have been informed that it was necessary to have the name of the allottee. Upon giving the name of the allottee, it appears conclusively from the testimony of Ford, Mossman and Brasel, that they would have been informed of the lease of the complainant upon the land in question. On the contrary, they attempted by long distance communication, and, in addition thereto, by a

wrong method, to obtain information, which, by the adoption of reasonable and diligent methods, they would have ascertained to a certainty.

Having been negligent, the inference of actual notice is necessary and absolute. That being so, neither Reese, Davis nor Harmon are *bona fide* purchasers and can have no right in this Court.

The next transfer with which we are connected is the assignment by Mr. Reese on November 30, 1906, of an undivided one-fourth interest in the commercial oil and gas mining lease aforesaid to J. A. Hull.

In this connection it appears from the testimony of Mr. Hull (Pr. Tr., 127):

> "That at the time of the execution and delivery of this assignment no consideration passed from me to Mr. Reese. We had a good bit of dealing back and forth, and didn't have a final settlement until June, 1907. He charged the amount of the consideration to me, upon our mutual account. The amount of the consideration was included upon our final settlement in June, 1907. At that time he rendered me a bill for what I owed him, and I paid it."

On March 1, 1907, Congress passed an Act containing the following:

> "The filing heretofore or hereafter of any lease in the office of the United States Indian Agent, Union Agency, Muskogee, Indian Territory, shall be deemed constructive notice."

As stated before, the essential elements which constitute a *bona fide* purchase are, therefore, three—a valuable consideration, the absence of notice, and the presence of good faith.

The law as to the valuable consideration is stated by

Pomeroy in his work on Equity Jurisprudence, Vol. II., paragraphs 746, 747, 750 and 751, as follows:

> "The question of valuable consideration involves, of course, the question of its payment. The great fundamental principle of the payment of a valuable consideration is:
>
> "It is requisite that the money be paid or advanced, the property transferred, the right surrendered, or the obligation assumed *at the time of the conveyance*, and as a part of the transaction, in order that it may be the valuable consideration that can protect the purchaser.
>
> "Not only must there be a valuable consideration in part, but it must be paid before notice of the prior claim. Notice after the agreement for the purchase is made, but before any payment, will destroy the character of *bona fide* purchaser.
>
> "There must be actual payment before any notice or what in law is tantamount to actual payment. It follows, therefore, that his own promise, contract bond, etc., will not render the party a *bona fide* purchaser, nor entitle him to protection; for upon failure of the consideration he can be relieved from such obligations in equity and also by law."

Mr. Hull, of course, cannot be held to be a *bona fide* purchaser, for the uncontradicted evidence shows that the consideration for the transfer of his interest in the lease to him was not paid until long after he had notice of the lease of complainant under the Act of March 1, 1907.

If there are no *bona fide* purchasers in the record up to March 1, 1907, of course there are no *bona fide* purchasers in the case whatever, and the complainant must be held to hold the oil and gas lease upon the lands free and unencumbered.

THIRD PROPOSITION

The lands in controversy, having been conveyed by the patent from the United States and the Creek Nation to the "Heirs of Andrew J. Berryhill, deceased," were not "inherited lands" under Section 22 of the Act of Congress of April 26, 1906 (36 Stat. L. 145), therefore the restrictions against alienation of the lands imposed by the provisions of the Supplemental Creek Agreement, (32 Stat. L. 500), were not removed at the time of the execution of the warranty deed to the appellees, Edmond McKay and Perry McKay; and, therefore, the deed and the lease under which the appellees, the McKays and Kiefer Oil and Gas Company claim are void.

While this proposition sets forth the position of the intervenor herein, yet, at the same time, if this Court hold that the appellees did not take the deeds and lease under which they claim with notice of this appellant's lease, still the truth of the above proposition will defeat any claim of the appellees to the lands in controversy, and will entitle the appellant to the relief prayed for.

The deed from George Franklin Berryhill and his wife, Clementine Berryhill, to the appellees, Edmond McKay and Perry McKay, was executed and delivered on the 5th day of June, 1906.

October 12, 1906, the said appellees executed and delivered to Arthur B. Reese the oil and gas mining lease which has come by various assignments to the defendant, Kiefer Oil and Gas Company. These instruments are shown in the record as Exhibits "A" and "B" to the answer of the appellees filed to the bill of complaint.

If, at the time of the execution of the deed to the McKays, the restrictions on alienation had not been removed from the land in controversy, then both the deed

and the lease are absolutely void, and no interest whatever accrues to the defendants. The lands were allotted to the heirs of Andrew J. Berryhill under the provisions of Section 7 of the "Supplemental Creek Agreement," and we have previously shown that the title to the lands inured in the heirs by purchase as allottees.

Section 16 of the same agreement provides:

> "Lands allotted to citizens shall not in any manner whatever, or at any time, be incumbered, taken or sold to secure or satisfy any debt or obligation, *nor be alienated by the allottee or his heirs before the expiration of five years from the date of the approval of this supplemental agreement*, except with the approval of the Secretary of the Interior. * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner *and no rule of estoppel shall ever prevent the assertion of its invalidity.*"

This agreement was incorporated in an Act of Congress approved by the President June 30, 1902 (32 Stat. L., 500); ratified by the Creek Nation July 26, 1902; and, in accordance with the terms of the agreement, proclaimed by the President August 8, 1902.

Section 22 of an Act of Congress, approved April 26, 1906, and entitled "An Act for the Final Disposition of the Affairs of the Five Civilized Tribes in the Indian Territory, and for Other Purposes," provides:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribes to which he or she belongs or belonged, *may sell and convey the lands inherited from such decedent;* and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian

duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the County in which said minor or minors may reside or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Acting apparently on the assumption that this section removed the restrictions on the alienation of the lands in controversy, the appellees, Edmond McKay and Perry McKay, procured from the intervenor, George Franklin Berryhill, a warranty deed covering the lands in controversy. And it is now the contention of the appellees that these lands come within the designation of "inherited lands" and that the restrictions were therefore removed by this section.

We assert with confidence that this contention is unsound, and that the restrictions on the alienation of the lands involved in this suit continued in full force until the expiration of the five-year period, as fixed by Section 16 of the "Supplemental Creek Agreement."

It is not contended that the deed to the McKays was ever approved by the Secretary of the Interior, nor ever submitted to the Secretary of the Interior for his approval; and it is incumbent on the appellees to show affirmatively and clearly the validity of their deed.

Libby v. *Clark*, 118 U. S., 30 L. Ed., 133, affirming the decision of the Supreme Court of Kansas.

The word "inherited" has a well defined meaning both under the common law and in our statute law. "Inherited" lands are those of which the ancestor dies seized, and which vest in the descendants by operation of law on the

death of the ancestor. To inherit is to take as heir at law by descent or distribution. We have heretofore shown that the lands in controversy were not lands coming to the heirs on the death of the ancestor; and appellees' contention must resolve itself into this: That the court is justified in extending the words and meaning of the said Section 22, so as to bring the present case within its scope. We submit that this cannot be done.

It is a well known and well settled rule of construction that where the legislature makes use of a word of a well known and definite sense in the law, the courts will receive and expound it in the same sense in the statute.

Harris v. *Reynolds* (Cal.), 73 Am. Dec., 602;
Ex parte Vincent (Ala.), 62 Am. Dec., 717;
Quigley v. *Gorham* (Cal.), 63 Am. Dec., 139;
Hillhouse v. *Chester* (3 Day) 3 Am. Dec., 267.

This principle is laid down in Lewis' Sutherland on Statutory Construction, Sec. 390, in this wise: "The words of a statute are to be read in their ordinary sense unless so construing them will lead to some incongruity or manifest absurdity." And again, in Section 393: "It is a well settled rule of construction that where legal terms are used in a statute, they are to receive their technical meaning, unless the contrary plainly appears to have been the manifest intent of the Legislature." And in Section 398: "Where a statute uses a word, which is well know and has a definite sense at common law or in the written law, without defining it, it will be presumed to be used in that sense and will be so construed, unless it clearly appears that it was not so intended." "Words having a precise and well-settled meaning in the jurisprudence of a country are to be understood in the same sense when used in statutes, unless a different meaning is unmistakably intended."

In *Buckner* v. *Real Estate Bank*, 5 Ark., 536, the court in laying down this principle said: "If a statute make use

of a word the meaning of which is well known, and has a definite sense in the common law, the word shall be expounded and restricted in that sense." Again, the Supreme Court of Maryland, in a case before it involving this principle, said: "It is a well settled rule in the construction of a statute, that words are to be taken in their natural and ordinary signification and import, and if technical words are used they are to be taken in a technical sense."

State v. *Baltimore and Ohio R. R. Co.*, 38 Am. Dec., 320.

Following the law of these authorities, it must follow that unless the lands in question come to the heirs by descent from their ancestor, the said Section 22 has no application.

Counsel for appellees not only ask the Court to radically depart from these settled principles, but also to reach out and bring within the purview of the Act, situations not warranted by any construction of the words of the section. Suppose, for the sake of argument, that the Court does give to the word "inherited" a so-called popular meaning; and that it be taken to mean "obtained," "acquired," "derived," etc. Still defendants' contention will not stand. Under the section it is absolutely essential that the lands come "from the decedent." This requirement is not present in the case at bar. In no sense do the lands come by, from or through the decedent, Andrew J. Berryhill. They come to the heirs directly from the United States and the Creek Nation by allotment and purchase.

The Secretary of the Interior in the first rules relating to the execution of oil and gas mining leases and deeds on lands in the Creek Nation, promulgated January 21, 1903, recognized this distinction between lands allotted to the heirs and the lands inherited by the heirs. His rules and regulations provided:

> "A lease or conveyance of *undivided inherited lands*, or of *undivided allotments made directly to the heirs of a deceased citizen*, will be approved only in cases where all the heirs join in the lease, deed or instrument of conveyance."

This distinction is still maintained, and is recognized by the Interior Department. To say that the same distinction was not in the minds of the legislators who framed the Section 22 would seem to us unwarranted and at variance with the facts.

A further general principle of statutory construction is, that the province of construction and interpretation does not begin until the statute under consideration is shown to be ambiguous.

Where in the above quoted Section 22 is there any ambiguity? We submit that it lies solely in the creative genius of counsel for the appellees. This section was taken and framed from a like section of the treaty entered into between the United States and the Kansas and Kaw Indians in 1902. (32 Stat. L., 636.) That section is identical with the section we are discussing, and reads as follows:

> "That the adult heirs of any deceased Kansas or Kaw Indian whose selection has been made, or to whom a deed has been issued for his or her share of the lands of said tribe in Oklahoma Territory, may sell and convey the lands inherited from such decedent. * * *"

No allotments under this treaty were to be made to the heirs; and there, as here, the word "inherited" was used in its well-recognized legal sense.

The section quoted from the Act of April 26, 1906, is clear, plain and free from ambiguity; and we believe that the Court will not feel justified in going outside of the terms of the section to embrace the case under consideration. It is not within the scope of the section and the deed of

appellees, Edmond and Perry McKay, we submit, must be held to be void.

In the case of *Doe* v. *Considine,* counsel for plaintiffs urged the Court to go ouside of the terms of the statute there under consideration, and this Honorable Court, through Justice SWAYNE, said:

> "Were we to adopt the construction claimed by the plaintiff's counsel, instead of adjudicating we should legislate. That we have no power to do. Our function is to execute the law, not to make it."
>
> 6 Wall., 480.

In *Thornley* v. *United States,* 113 U. S., 310, this Court said:

> "Where the meaning of a statute is plain, it is the duty of the courts to enforce it according to its obvious terms. In such case there is no necessity for construction."

To the same effect is *St. Paul M. & M. R. Co.* v. *Phelps,* 137 U. S., 34 L. Ed., 767.

In the case of *Board of Lake County Commissioners* v. *Rollins,* 130 U. S., 32 L. Ed., 1063, it was sought to narrow the express language of the section there being considered, and the Court said:

> "We are unable to adopt the constructive interpolations ingeniously offered by counsel for defendant in error. Why not assume that the framers of the Constitution, and the people who voted it into existence, meant exactly what it says? At the first glance, its reading produces no impression of doubt as to its meaning. It seems all-sufficiently plain; and in such cases there is a well settled rule which we must observe. The object of construction applied to a Constitution is to give effect to the intent of its framers, and of the people in adopting it. This intent is to be found in the instrument itself; and when the text of a Constitutional provision

is not ambiguous the courts, in giving construction thereto, are not at liberty to search for its meaning beyond the instrument.

"To get at the thought or meaning expressed in a statute, contract or a constitution, the first resort, in all cases, is to the natural signification of the words, in the order of grammatical arrangement in which the framers of the instrument have placed them. If the words convey a definite meaning, which involves no absurdity nor any contradiction of other parts of the instrument, then that meaning apparent on the face of the instrument must be accepted, and neither the courts nor the Legislature have the right to add to it or take from it. So, also, where a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."

Lastly, we assert that the above quoted Section 22, if open to construction, should be strictly and not liberally construed.

The Act of Congress which brought into existence the Commission to the Five Civilized Tribes, was passed March, 1893. The Commission was to assist in the extinguishment of the National and tribal titles to the lands of the Five Tribes, either by cession to the United States or by allotment and division of the same in severalty among the citizens of the several tribes. This was to be done with the consent of the tribal owners. The Commissioners were to enter upon negotiations with the several Nations of Indians with the purpose, *first*, of allotting the lands in severalty to the Indians, and, *secondly*, to obtain a cession of the lands not needed for allotment. It was not the policy of the Government, as outlined in the Act, to take any steps in relation to the tribal lands, except by agreement with the various tribes, and they were accompanied with all the

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solemnities of treaties with foreign powers. One of these agreements which we have referred to as the "Supplemental Creek Agreement," provided for the allotment of the lands in controversy. Representatives of the United States and representatives of the Creek Nation met and concluded the agreement. Section 21 provided:

> "This agreement shall be binding upon the United States and the Creek Nation and upon all persons affected thereby, when it shall have been ratified by Congress and the Creek National Council; and the fact of such ratification shall have been proclaimed as hereinafter provided."

The next section provides for the calling of a special session of the Creek National Council, and for the proclamation by the President.

Pursuant to these sections the agreement was duly approved by Congress June 30, 1902; was ratified by the Creek Nation July 25, 1902, and proclaimed by the President August 8, 1902. By the terms of the agreement, lands in the Creek Nation were to remain inalienable for five years. This was the solemn pact between the parties.

Later then, by the act of only one of the parties, the restrictions were lifted from a part of the lands in violation of the terms of the agreement. It is undoubtedly true that under the decisions of the Supreme Court, the Congress of the United States has the power to annul the provisions of an agreement or treaty made with an Indian tribe. We assert, however, that when Congress chooses to avail itself of this power, and passes an Act in violation of the provisions of any treaty or agreement, such an Act should be construed strictly and not extended by implication in any manner. This should be applied to Section 22 of the Act of April 26, 1906, and doubts, if any exist, should be resolved in favor of the Indian.

See 22 Cyc., 122, and cases there cited.

We therefore repeat our third proposition, and submit that on June 5, 1906, the date of the execution and delivery of the deed from George Franklin Berryhill to the defendants, Edmond McKay and Perry McKay, the restrictions against alienation of the lands in controversy had not expired, and that the deed was void and no title passed thereby.

JURISDICTION *of the* COURT

It is not asserted by the appellees that the Courts of Equity of the United States have not jurisdiction to grant the relief prayed for in the appellant's bill of complaint. However, lest this question arise in the consideration of this cause, we desire to cite some authorities holding that in a case of this kind, a Court of Equity will grant relief upon the ground of irreparable injury, although the defendant may not be charged or proven to be insolvent.

Graves v. *Ashburn*, 215 U. S. 331;

Preteca v. *Maxwell Land Grant Co.* (C. C. A.), 50 Fed. 674;

Big Six Development Co. v. *Mitchell* (C. C. A.), 138 Fed. 279;

Oolagah Coal Co. v. *McCaleb* (C. C. A.), 68 Fed. 87;

Alleghany Oil Co. v. *Snyder* (C. C. A.), 106 Fed. 770;

Peck v. *Agnes & L. Tie Co.* (C. C. A.), 116 Fed. 273;

Logan Natural Gas Co. v. *Southern Gas and Oil Co.* (C. C. A.), 126 Fed. 623;

Hammond v. *Winchester* (Ala.), 2 So. Rep. 892;

Jerome v. *Ross* (N. Y.), 11 Am. Dec. 484;

West Point Iron Co. v. *Reymert,* 45 N. Y. 703;
Bettman v. *Harness* (W. Va.), 26 S. E. Rep. 271;
Williamson v. *Jones* (W. Va.), 64 Am. Rep. 391.

There is no adequate remedy at law in ejectment.

Kelly v. *Keys* (Pa.), 62 Atl. Rep. 911;
Dark v. *Johnson,* 55 Pa. St. 164;
Union Petroleum Co. v. *Bliven Petroleum Co.,* 72 Pa. St. 183;
Watford Oil & Gas Co. v. *Shipman* (Ill.), 84 N. E. Rep. 53;
Gillespie v. *Fulton Oil & Gas Co.* (Ill.) 86 N. E. Rep. 219;
Kolachny v. *Galbreath* (Okla.), 110 Pac. Rep. 902.

RECAPITULATION

In conclusion, appellant insists on the following propositions discussed in the foregoing argument:

1. George Franklin Berryhill, as the sole heir of his son, acquired title to the lands in controversy as an allottee and by purchase from the United States and the Creek Nation.

2. The lands in controversy coming in fact to the heir by purchase and not by descent, no rule of construction or interpretation will justify an assumption that the title came by descent.

3. George Franklin Berryhill, as the heir nearest in the line of succession to his son, Andrew J. Berryhill, acquired an estate in fee simple in the lands in controversy under the provisions of Section 1 of Chapter 49 of the Statutes of Arkansas.

4. If it be held that the lands in controversy came to the heirs of Andrew J. Berryhill by descent, and not by purchase, then the lands should be held to be an ancestral estate in the hands of the heirs and title thereby vested in fee simple in George Franklin Berryhill.

5. The recording laws of the State of Arkansas put in force in the Indian Territory "so far as applicable," by Act of Congress, approved February 19, 1903, had no application to oil and gas leases on the restricted lands in the Creek Nation.

6. The appellees cannot be held to be purchasers in good faith and without notice of any interest in the lands in controversy.

7. The lands in question cannot be held to be "inherited" lands under the provisions of Section 22 of the Act of Congress approved April 26, 1906, for the reason that the heir himself was the first taker, and the ancestor was without any interest in the said lands.

8. That the oil and gas mining lease executed by the intervenor to the appellant, is good and valid, and vests in this appellant the sole right to the oil and gas in and under the lands in controversy.

9. That the claims of the appellees, and the instruments under which they claim, are void, and constitute clouds upon the right and title of this appellant.

Respectfully submitted,

C. L. THOMAS,
EDGAR A. DE MEULES,

Solicitors for Appellant,
Albert W. Shulthis.

Supreme Court of the United States

Office Supreme Court,
FILED.
DEC 16 191
JAMES H. McKEN

OCTOBER TERM, 1911—NO. 156.

ALBERT W. SHULTHIS, *Appellant*,

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY, AND GEORGE FRANKLIN BERRYHILL.

OCTOBER TERM, 1911—NO. 157.

GEORGE FRANKLIN BERRYHILL, *Appellant.*

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, AND THE KIEFER OIL & GAS COMPANY.

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF IN SUPPORT OF THE MOTIONS FILED BY APPELLEES TO DISMISS THE APPEALS ALLOWED IN THE ABOVE STYLED CASES.

Preston C. West,
Geo. S. Ramsey,
Counsel for Appellees.

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SUPREME COURT *of the* UNITED STATES

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(Copy)

IN THE SUPREME COURT OF THE UNITED STATES

No. 156, October Term, 1911.

ALBERT W. SHULTHIS, *Appellant,*

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, AND THE KIEFER OIL & GAS COMPANY, *Appellees.*

MOTION BY APPELLEES,

D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company, to Dismiss the Appeal.

Come now the appellees, D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company, by and through their counsel, Preston C. West and Geo. S. Ramsey, and move the court to dismiss the appeal taken in this case by appellant, A. W. Shulthis, on the 25th day of October, 1909, from the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on June 3, 1909, because the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit is final in this cause under Section 6 of the Act of Congress of 1891 (26 St. L. 826), it appearing that the jurisdiction of the Circuit Court of the United States for the Eastern District of Oklahoma was dependent entirely upon the opposite parties to this suit being citizens of different states, to-wit—the plaintiff being a citizen of the State of Kansas, and all the defendants appellees being citizens of the State of Oklahoma and the Eastern District thereof.

And, in support of this motion, said appellees herewith file the brief of authorities relied upon.

Wherefore, said appellees pray judgment of the court and that the appeal allowed appellant in this case be dismissed.

Respectfully submitted,

GEO. S. RAMSEY,
PRESTON C. WEST,
Counsel for said Appellees.

(Copy)

IN THE SUPREME COURT OF THE UNITED STATES

No. 157, October Term, 1911.

GEORGE FRANKLIN BERRYHILL, *Appellant,*

vs.

D. A. MCDOUGAL, EDMOND MCKAY, PERRY MCKAY, AND THE KIEFER OIL & GAS COMPANY, *Appellees.*

MOTION BY APPELLEES,

D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company, to Dismiss the Appeal.

Come now the appellees, D. A. McDougal, Edmond McKay, Perry McKay, and The Kiefer Oil & Gas Company, by and through their counsel, Preston C. West and Geo. S. Ramsey, and move the court to dismiss the appeal taken in this case by appellant, George Franklin Berryhill, on the 25th day of October, 1909, from the judgment of the United States Circuit Court of Appeals for the Eighth Circuit, rendered on June 3, 1909, because the judgment and decree

of the United States Circuit Court of Appeals for the Eighth Circuit is final in this cause under Section 6 of the Act of Congress of 1891 (26 St. L. 826), it appearing that the jurisdiction of the Circuit Court of the United States for the Eastern District of Oklahoma was dependent entirely upon the opposite parties to this suit being citizens of different states, to-wit—the plaintiff being a citizen of the State of Kansas, and the appellees, including intervenor, being citizens of the State of Oklahoma and the Eastern District thereof.

And, in support of this motion, said appellees herewith file the brief of authorities relied upon.

Wherefore, said appellees pray judgment of the court and that the appeal allowed appellant in this case be dismissed.

Respectfully submitted,

GEO. S. RAMSEY,
PRESTON C. WEST,
Counsel for said Appellees.

SUPREME COURT *of the* UNITED STATES

OCTOBER TERM, 1911—NO. 156.

ALBERT W. SHULTHIS, *Appellant,*

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY, AND GEORGE FRANKLIN BERRYHILL.

OCTOBER TERM, 1911—NO. 157.

GEORGE FRANKLIN BERRYHILL, *Appellant.*

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, AND THE KIEFER OIL & GAS COMPANY.

Appeals from the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF IN SUPPORT OF THE MOTIONS FILED BY APPELLEES TO DISMISS THE APPEALS ALLOWED IN THE ABOVE STYLED CASES.

May It Please the Court:

The jurisdiction of the Circuit Court of the United States for the Eastern District of Oklahoma was invoked by the plaintiff (appellant) solely on the ground of diver-

sity of citizenship. The jurisdictional allegations in the plaintiff's bill are as follows:

(1) "That he is now, and was at all times herein mentioned, a citizen of the United States of America, and is now, and was at all said times a citizen and resident of and within the State of Kansas.

(2) "That at all times herein mentioned the said defendants, D. A. McDougal, Edmond McKay and Perry McKay, were and each of them now is, a citizen of that part of the State of Oklahoma now comprising the Eastern District of Oklahoma.

(3) "That the defendant, Kiefer Oil & Gas Company, is a corporation duly organized on the 26th day of April, 1907, under and by virtue of the laws of the United States in force in Indian Territory, having its principal place of business in said territory. That said defendant existed under the laws of said territory and was a citizen of said territory up to and including November 16, 1907. That at all times since the admission of Oklahoma as a state, said defendant has been and now is a citizen and a resident of said State of Oklahoma, and a citizen and resident of the Eastern District of Oklahoma."

The plaintiff instituted this suit for the purpose of quieting his alleged title to the oil and gas rights in a certain 160 acres of land, and for the purpose of obtaining an injunction against the appellees, defendants therein, restraining them from prospecting upon or drilling the lands for oil and natural gas or otherwise, and from extracting any oil and gas therefrom.

The bill further prays that the defendants "may be enjoined and restrained by this court from asserting any interest in or to said premises and particularly the said oil and gas deposits, adverse and hostile to the interest and title of your orator therein, and be enjoined and restrained

from in any wise interfering with the rights of your orator acquired under and by virtue of the lease hereinbefore set forth; and that upon final hearing said injunction be made perpetual."

A receiver is likewise prayed for, and the bill also contains a prayer to the effect that plaintiff "be adjudged to have by virtue of the lease hereinbefore set forth the sole and exclusive right, as lessee, to all and singular the natural gas deposits in and under the said tract of land hereinbefore described, with the right to prospect for, extract, pipe, store, refine, and remove such oil and natural gas and to occupy and use so much of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, etc., etc."

Further plaintiff prayed:

> "That said defendants and each of them may be adjudged to have no interest, estate or property in or to said oil and gas deposits or any part thereof save only in so far as any of said defendants may have an interest in said real estate and entitled to the royalty secured by said lease hereinbefore mentioned; and that the cloud cast upon the title of your orator by any and all claims of title or interest or estate made by said defendants, or any one or more of them, may be removed and the title of your orator forever quieted thereto."

This relief is asked for by the plaintiff upon the allegations, in short, as follows:

> *1st.* That Andrew J. Berryhill was born to George Franklin Berryhill and Clementine Berryhill, Creek Indians, in the month of May, 1901, and died in the month of November, 1901;
>
> *2nd.* That, on May 8, 1902, the name of Andrew J. Berryhill was duly placed on the approved Creek

Indian roll by the Commission to the Five Civilized Tribes and the land in controversy allotted in the name of Andrew J. Berryhill, deceased;

3rd. That, on the 10th day of October, 1905, a patent was executed by the Principal Chief of the Creek Nation conveying said lands described to the heirs of Andrew J. Berryhill, deceased; and that said patent was approved by the Secretary of the Interior on the 31st day of October, 1905.

4th. That, on the 24th day of March, 1906, George Franklin Berryhill and Clementine Berryhill "were the owners in fee of that part of the land allotted in the name of Andrew J. Berryhill, described as follows: The Northeast Quarter of the Northwest Quarter of Section Eighteen (18), Township Seventeen (17) North, Range Twelve (12) East. (This is the land in which the oil and gas mining rights are involved in this case.)

5th. That, on the 24th day of March, 1906, George Franklin Berryhill and Clementine Berryhill, being the owners in fee of said land, executed and delivered to the plaintiff, in quadruplicate parts, an oil and gas mining lease for a term of fifteen years from date thereof, on the form of lease prescribed by the Secretary of the Interior under his rules and regulations for Creek Indians to execute for oil and gas mining purposes.

6th. That the lease was filed on the 21st day of April, 1906, in the office of the United States Indian Agent, at Union Agency, Muskogee.

7th. That, on the 19th day of April, 1907, said lease "was duly approved by the said Secretary of the Interior."

8th. That plaintiff filed in the office of the United States Indian Agent "a bond to accompany said lease, in all respects in accordance with the regulations of the Secretary of the Interior," and that on the 18th day of April, 1907, said bond "was approved by the Secretary of the Interior."

9th. That the quadruplicate parts of said lease were delivered, one to the lessor and one to the lessee, and one retained by the Secretary and one by the Indian Agent.

10th. Said bill contains the following allegation: "That your orator has in all things duly complied with all regulations duly and legally prescribed by said Secretary of the Interior relating to the leasing of lands of citizens of the Creek Nation for oil and gas mining purposes." And plaintiff thereupon sets out in his bill a copy of said rules and regulations—none of which rules and regulations were required by good pleading to be set out in the bill, and none of which rules and regulations were ever called in question by the answer of the defendants, and none of these rules and regulations were ever interpreted, construed or applied in the decision of this case by either the Circuit Court or the Circuit Court of Appeals.

11th. Plaintiff further alleges "that under and by virtue of said lease he is the owner of and has the exclusive right to all oil deposits and natural gas in and under said last above described land, with the further right to enter on said land and to prospect for, extract, pipe, store, refine and remove such oil and natural gas and to occupy and use so much of the surface of said land as may be reasonably necessary to carry on the work of prospecting for, extracting, piping, storing, refining and removing such oil and natural gas, including also the right to obtain from wells or other sources on said land by means of pipe lines or otherwise sufficient supply of water to carry on such operations, and including still further the right to use such oil and natural gas for fuel so far as is necessary in the prosecution of said operations."

Plaintiff further alleges "that the defendants and each of them claim and assert some right, title and interest in and to said lands and particularly to the said oil and natural gas deposits adverse to your orator, but the nature of said claims of said defend-

ants is to your orator unknown. Your orator states that they have no such right, title or interest in said deposits of oil and natural gas or any part thereof; that whatever claimed rights the said defendants or any of them have therein, were acquired long *subsequent* to the right of your orator hereinbefore set forth; and further were acquired with notice and knowledge of the lease to your orator so executed; *filed and approved as aforesaid;* and also facts and circumstances sufficient to put them and each of them upon inquiry with reference thereto."

12th. Plaintiff further alleges that the defendants have confederated, and unlawfully and wilfully entered upon said lands and bored and drilled wells thereon and removed from said lands large quantities of oil and gas to the damage of the plaintiff in the sum of $25,000.00, and that unless restrained defendants will continue to drill other wells and extract oil from said lands to the plaintiff's injury.

13th. It is alleged that the defendant, The Kiefer Oil & Gas Company, is insolvent, and that the defendants are unable to respond in damages in any recovery at law, and that the removal of said oil and gas from the land is a destruction of the estate of plaintiff to his irreparable injury.

It will, therefore, be seen, from an examination of the bill, that it is a suit to enjoin trespass resulting in an alleged irreparable injury to the plaintiff on account of the extraction of oil and gas from the *corpus* of the plaintiff's estate. The only essential allegations required by good pleading were the allegations that the plaintiff was the owner of the oil and gas mining rights in and to the land described; and that the defendants, with notice of the plaintiff's rights, had entered thereon, and, to the destruction of the plaintiff's rights, had operated said land for oil and gas and removed the same to the damage of the plaintiff. An allegation that the plaintiff had an approved depart-

mental oil and gas mining lease from the owner of the fee was sufficient allegation to show title in the plaintiff.

The question then presented is: Did the matter in dispute in this case arise "under the Constitution or laws of the United States or treaties made, * * * or in which controversy the United States are plaintiffs or petitioners, or in which there shall be a controversy between citizens of different states, in which the matter in dispute exceeds, exclusive of interest and cost, the sum or value aforesaid, or a controversy between citizens of the same state claiming lands under grants of different states, or a controversy between citizens of a state and foreign states, citizens or subjects, in which the matter in dispute exceeds, exclusive of interest and cost, the sum or value aforesaid, etc.?" (25 Stat. L. 434.)

We contend that the jurisdiction of the Circuit Court of the United States for the Eastern District of Oklahoma was "dependent entirely upon the opposite parties to the suit or controversy, being * * * citizens of different states."

In *Colorado Consolidated Mining Co.* v. *Turck*, 150 U. S. Rep. 141; 37 L. Ed. 1030, Mr. Chief Justice FULLER said:

> "If the judgment of the Circuit Court of Appeals for the Eighth Circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different states."

POINT ONE.

Whether or not the jurisdiction of the Circuit Court depended solely upon the diversity of citizenship must be

determined from an examination of the plaintiff's bill to the exclusion of all other parts of the record.

In *Florida Central & Peninsula Railroad Co.* v. *Bell*, 176 U. S. Rep. 325; 44 L. Ed. 488, this court said:

> "In order to maintain our jurisdiction it must appear that the jurisdiction of the Circuit Court was not dependent solely upon the opposite parties being citizens of different states. (Citing authorities.) This question must be answered from an inspection of the declaration of the plaintiffs in the Circuit Court. Does it disclose that the plaintiffs invoked the jurisdiction of that court because the parties were citizens of different states, or because the case was alleged to be one arising under the Constitution, laws, or treaties of the United States?"

Further on, in the same case, Mr. Justice SHIRAS said:

> "It must be regarded as conclusively established by our decisions that the jurisdiction of the Circuit Court must appear in the plaintiffs' statements of their case."

In *Western Union Telegraph Co.* v. *Ann Arbor R. Co.*, 178 U. S. Rep. 232; 44 L. Ed. 1052, Mr. Chief Justice FULLER said:

> "When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the Constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the Constitution or laws: And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the Constitution or some law or treaty of the United States, before jurisdiction can be maintained on that ground."

To ascertain whether a Federal question was involved we must look to the plaintiff's bill, not as it may perhaps be drafted but as it should have been drafted. In other words, was it necessary for the plaintiff, in the statement of his case, to reveal and disclose a Federal question? If the plaintiff could state his case logically and in the form of good pleading, without disclosing a Federal question, then the fact that it may appear from the bill that a Federal question may arise does not, however, confer upon the Circuit Courts of the United States jurisdiction.

Bonin v. *Gulf Co.*, 198 U. S. Rep. 116, 49 L. Ed. 971;

Empire State-Idaho M. & D. Co. v. *Hanley*, 198 U. S. Rep. 293, 49 L. Ed. 1056;

Bankers' Mutual Casualty Co. v. *Minneapolis, St. Paul, etc., R. Co.*, 192 U. S. Rep. 374, 48 L. Ed. 484;

Arbuckle v. *Blackburn*, 191 U. S. Rep. 406, 48 L. Ed. 240.

POINT TWO.

Jurisdiction cannot be conferred upon the Circuit Court by the defendants setting up a Federal question or making a claim to the title under some Federal law. The answer can not be examined to aid the Court in deciding this question.

After pointing out that the answer or plea filed in the State court may raise a Federal question, so as to confer jurisdiction under law in force before Act of 1875 upon the United States Circuit Court upon removal, this court held that the rule was different when the suit is originally instituted in the United States Circuit Court and not brought into the Circuit Court by removal from a State Court, in *Metcalf* v. *Watertown*, 128 U. S. Rep. 586; 32 L. Ed. 543, and said:

"Where, however, the original jurisdiction of a Circuit Court of the United States is invoked upon the sole ground that the determination of the suit depends upon some question of a Federal nature, it must appear, at the *outset*, from the declaration or the bill of the party suing, that the suit is of that character; in other words, it must appear, in that class of cases, that the suit was one of which the Circuit Court at the time its jurisdiction is invoked, could properly take cognizance. If it does not so appear, then the court, upon demurrer, or motion, or upon its own inspection of the pleadings, must dismiss the suit; just as it would remand to the State court a suit which the record, at the time of removal, failed to show was within the jurisdiction of the Circuit Court. *It cannot retain it in order to see whether the defendant may not raise some question of a Federal nature upon which the right of recovery will finally depend; and if so retained, the want of jurisdiction at the commencement of the suit is not cured by an answer or plea which may suggest a question of that kind.*" (Italics ours.)

In other words, if the jurisdiction of the court was not invoked by the bill upon some other ground than the diversity of citizenship, it never obtained jurisdiction thereafterwards upon any other ground.

In *Colorado Consolidated Mining Co.* v. *Turck*, 150 U. S. Rep. 139; 37 L. Ed. 1030, Mr. Chief Justice FULLER said:

"The jurisdiction of the Circuit Court was invoked, December 2, 1885, by the filing of the complaint, from which it appeared that the suit was one of which cognizance could be properly taken on the ground of diverse citizenship, but it did not appear therefrom that jurisdiction was rested, or could be asserted on any other ground. The Federal question now suggested did not emerge until the defendant set up its second defense, and not then unless deducible from the bare averment that it claimed under the senior dis-

> covery and patent, which was admitted in the replication. * * * The jurisdiction had, however, already attached and could not be affected by the subsequent developments. It depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred."

The above holdings are cited and approved by this court in *Ayres* v. *Polsdorfer,* 187 U. S. Rep. 586; 47 L. Ed. 314.

Although Mr. Justice HARLAN, in *Metcalf* v. *Watertown, supra,* suggested an apparent distinction between removal cases and cases originally filed in the Circuit Court, and pointed out that while in removal cases under the old Act (18 St. L. 470) resort may be had to the defendant's plea or answer to import into the record a Federal question, yet the Federal question in a suit originally filed in the Circuit Court of the United States must appear from the plaintiff's petition.

Under the Act of 1875 (25 St. L. 434), no case is removable from the State court unless the plaintiff's statement of his case in his complaint or petition necessarily discloses some Federal question, and, if it does not so appear from the face of the plaintiff's bill or petition, the want of such Federal question cannot be supplied by any statement in the petition for removal.

> *Mountain View Mining Co.* v. *McFadden,* 180 U. S. Rep. 534, 45 L. Ed. 656;
>
> *Chappell* v. *Waterworth,* 155 U. S. Rep. 102, 39 L. Ed. 85;
>
> *The Texas & Pacific R. Co.* v. *Cody,* 166 U. S. Rep. 606, 41 L. Ed. 1132.

In *Powell* v. *Brunswick Co., supra,* 150 U. S. 433, 37 L. Ed. 1134, this court said:

"If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved so that the State court could not have given judgment without deciding it, that will be sufficient to give this court jurisdiction; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily required therein, in arriving at the conclusions upon the matters actually presented and considered."

See, also:

Arkansas v. *Kansas & T. Coal Co.*, 183 U. S. Rep. 187, 46 L. Ed. 144;
Devine v. *Los Angeles*, 202 U. S. Rep. 315, 50 L. Ed. 1046.

In *Press Publishing Co.* v. *Monroe*, 164 U. S. Rep. 107, 41 L. Ed. 367, this court said:

"It was the defendant, and not the plaintiff, who invoked the Constitution and laws of the United States. This, as necessarily follows from the foregoing considerations, and as was expressly adjudged in *Colorado Central Consolidated Mining Co.* v. *Turck*, 150 U. S. 138, is insufficient to support jurisdiction of this court and to review, by appeal or writ of error, the judgment of the Circuit Court of Appeals."

The plaintiff cannot introduce a Federal question by stating in his bill the claim of title made by the defendants; nor can the plaintiff confer jurisdiction by alleging that the defendants claim title, or some right or privilege, arising under the laws and Constitution of the United States.

In *Florida Central & Peninsula R. Co.* v. *Bell*, 176

U. S. Rep. 322, plaintiff's bill filed in the Circuit Court, as analyzed by Mr. Justice SHIRAS, was as follows:

> "In the Circuit Court of the United States for the Southern District of Florida, William J. Bell, John W. Bell, Frank A. Bell, citizens of the state of Texas; E. A. Bell, Matilda P. Feihe, all heirs of and children of Louis Bell, deceased, late of Hillsborough County, State of Florida; and George A. Bell and Simon Bell, heirs of and grandchildren of said Louis Bell; and Anton Feihe, husband of said Matilda P. Feihe,— brought an action of ejectment against the *Florida Central & Pensinsula Railroad Company*, a corporation of the State of Florida, seeking to recover possession of about 7 acres of land in Hillsborough County, Florida, alleged to be of the value of $30,000, and damages in the sum of $10,000. The declaration alleged that the land in controversy was occupied by defendant as its roadbed and right of way, and that the plaintiffs claimed title to said land under and by virtue of a patent granted by the United States to said Louis Bell and his heirs upon a pre-emption claim filed in the local land office of the United States in 1883, and upon appeal to the General Land Office, and upon and from an appeal from the decision of the Commissioner of the General Land Office to the Secretary of the Interior of the said United States, when by the order of the said Secretary the said patent was granted. The declaration further alleged that, in the proceedings in the Land Department, the defendant claimed and contended that the plaintiffs were not, under any of the laws of the United States, entitled to have a patent to said land granted to said Louis Bell and his heirs, and that the defendant, at the time of the commencement of this suit, claimed and insisted that the plaintiffs derived no title to said land under and by virtue of the said patent, and at the same time claimed that under the laws of the United States, and especially under and by virtue of the 1st section of an Act of Congress entitled 'An Act Granting Public Lands in Alternate

Sections to the States of Florida and Alabama to Aid in the Construction of Certain Railroads in Said States,' approved May 17, 1856, it was entitled and had the right to locate the route of its railroad and construct the same through the said lands, and to be in possession thereof, on the ground, among other grounds, that the said land was a part of that tract of land which constituted at one time a military reservation, known as the Fort Brook Military Reservation at Tampa, State of Florida. And the plaintiffs further alleged in their declaration that after the passage of an Act of Congress entitled 'An Act to Provide for the Disposal of Abandoned and Useless Military Reservations,' approved July 5, 1885, they contended for and claimed title and a patent to said parcel of land, under and by virtue of the 1st proviso of the 2d section of the last-mentioned Act of Congress, both in the office of the said General Land Office and of the Secretary of the Interior; and that the defendant appeared in both of the said offices, by its counsel, and there claimed and contended, and at the commencement of this suit claimed and contended, that plaintiffs were not entitled to a patent or title to said parcel of land under the said proviso of said Act of Congress, and, at the times aforesaid, claimed and insisted that it was entitled to locate the route of its railroad through said parcel of land, and to be in possession thereof, under and by virtue of the 3rd proviso of the aforesaid Act of Congress approved May 17, 1856."

The court held that the jurisdiction of the lower court was not invoked by such allegations, and that no Federal question was presented.

See, also:

Tennessee v. *Union & P. Bank*, 152 U. S. Rep. 454, 38 L. Ed. 511;

Chappell v. *Waterworth*, 155 U. S. Rep. 102, 39 L. Ed. 85;

Eastlake Land Co. v. *Brown,* 155 U. S. Rep. 488, 39 L. Ed. 233;

Oregon Short Line & U. N. R. Co. v. *Skottwe,* 162 U. S. Rep. 491, 40 L. Ed. 1048;

Spencer v. *Duplan Silk Co.,* 191 U. S. Rep. 527, 48 L. Ed. 287;

Boston, etc., Consolidated Copper, etc., Mining Co. v. *Montana Ore Purchasing Co.,* 188 U. S. Rep. 633, 47 L. Ed. 626;

Third Street R. Co. v. *Lewis,* 173 U. S. Rep. 458, 43 L. Ed. 766;

Shields v. *Boardman,* 98 Fed. Rep. 455;

California Oil Co. v. *Miller,* 96 Fed. Rep. 19.

POINT THREE.

Where jurisdiction is claimed on the ground that there is a Federal question involved, it is not sufficient that the jurisdiction may be inferred argumentatively under averments on the pleadings. The averments and allegations showing the Federal question must be positive, and the exact Federal question or law of the United States involved must clearly appear.

Under this point, we call attention to the following decisions:

Handford v. *Davies,* 163 U. S. Rep, 274, 41 L. Ed. 157;

Iowa v. *Chicago, M. & St. P. R. Co.,* 33 Fed. Rep. 391;

Manhattan R. Co. v. *New York,* 18 Fed. Rep. 195.

POINT FOUR.

Plaintiff's allegation that he bases title to the oil and gas in the land, and right to operate the same and have defendants enjoined from operating said land upon an oil and gas mining lease made by a Creek Indian and approved

by the Secretary of the Interior does not present any federal question.

In *Shoshone Mining Co.* v. *Rutter,* 177 U. S. Rep. 508, 44 L. Ed. 865, this court held that a suit brought in support of an adverse claim to a mine, under Sections 2325, 2326, is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a Federal Court without regard to the citizenship of the parties, unless it involves the determination of a question as to the construction or effect of the mining laws. In the opinion, the court said:

> "We pointed out in the former opinion that it was well settled that a suit to enforce a right which takes its origin in the laws of the United States is not necessarily one arising under the Constitution or laws of the United States, within the meaning of the jurisdiction clauses; for if it did, every action to establish title to real estate (at least in the newer states) would be such a one, as all titles in those states come from the United States or by virtue of its laws."

The fact that the plaintiff in a case claims title by virtue of a patent from the United States does not raise a Federal question, and does not confer jurisdiction. So held by this court in *Florida Central & P. R. Co. v. Bell,* 176 U. S. Rep. 328-329, 44 L. Ed. 490. Also see:

Blackburn v. *Portland Gold Mining Co.,* 175 U. S. Rep. 571;

Romie v. *Casanova,* 91 U. S. Rep. 379, 23 L. Ed. 374;

Blue Bird Mining Co. v. *Largey,* 49 Fed. Rep. 289;

Starin v. *New York.* 115 U. S. Rep. 248, 29 L. Ed. 388;

Bonin v. *Gulf Company,* 198 U. S. Rep. 115, 49 L. Ed. 970.

Neither the decision of the Circuit Court, nor the Circuit Court of Appeals, turned upon a construction or

interpretation of the plaintiff's lease or the rules and regulations of the Secretary of the Interior; nor were these rules and regulations necessary to plead.

The question of descent under Chapter 49 of Mansfield's Digest of the Laws of Arkansas, put in force in the Indian Territory, arose in this case in the Circuit Court and in the Circuit Court of Appeals. These two courts differed about the construction on that question and held that the appellant's lessor, George Franklin Berryhill, had a fee simple title in the land as the sole heir of Andrew J. Berryhill, deceased. It was the contention of the defendants, appellees, that George Franklin Berryhill, the lessor, inherited nothing further than a life estate in the land in question, and that therefore the plaintiff's lease was void on account of having been made by a lessor who had not the title in fee but a mere life estate. This contention was resolved against the defendants, and the contention of the plaintiff was upheld. So the plaintiff cannot here insist that a Federal question was decided by the Circuit Court of Appeals, adversely to the contention of the plaintiff, from which the plaintiff could appeal.

POINT FIVE.

An appeal will not lie from the Circuit Court of Appeals to this Court on the ground that the suit arose under the Constitution or Laws of the United States, where, if the judgment of the Circuit Court of Appeals disposed of such question, its disposition and decision were in favor of the appellant.

In *Empire State-Idaho M. & D. Co.* v. *Hanley*, 198 U. S. Rep. 293, 49 L. Ed. 1057, this court said:

> "Appellants succeeded in their defense as to the one-third interest and Hanley accepted the result on the second appeal. They now make a grievance of

their own success and ask that the supposed Constitutional question as to the third interest only be made the basis of jurisdiction here, although, if the decree disposed of any such question, it was in their favor. In our opinion this can not be permitted."

See, also:

Anglo-American Provision Co. v. *Davis Provision Co.*, 191 U. S. Rep. 376, 48 L. Ed. 227;

Lampasas v. *Bell*, 180 U. S. Rep. 276, 45 L. Ed. 527.

There is no effort in the bill to set forth the contentions of the defendant, and, if the allegation of a diversity of citizenship is stricken out of the bill, the Circuit Court would have had no jurisdiction.

In *Empire State-Idaho M. & D. Co.* v. *Hanley, supra,* this court said:

> "If the allegation of diversity of citizenship had been omitted from the bill, the jurisdiction could not have been maintained."

Illustrative Cases.

As cases illustrative that a Federal question is not involved unless the pleadings clearly show that the construction or application of the Constitution or some law of the United States will necessarily be involved, we suggest an examination of the following cases:

Bankers' Mutual Casualty Co. v. *Minneapolis, etc., M. R. Co.*, 192 U. S. Rep. 373, 48 L. Ed. 484;

Devine v. *Los Angeles*, 202 U. S. Rep. 315, 50 L. Ed. 1046;

Shoshone Mining Co. v. *Rutter*, 177 U. S. Rep. 505, 44 L. Ed. 865.

The Circuit Court of Appeals construed the laws of descent, to-wit—Chapter 49 of Mansfield's Digest of the Laws of Arkansas put in force in Indian Territory—in favor of the appellant's contention, but construed Section 22 of the Act of Congress approved April 26, 1906 (34 St. L., 137), and, also, the Act of Congress of February 19, 1903 (32 St. L. 841), against the centention of appellant and against the contention of the intervenor. But these statutes were drawn in question after the bill was filed, and arose on the facts of the case.

POINT SIX.

The plaintiff's bill can only be sustained in equity on the ground that it is a suit in chancery to enjoin a trespass. The plaintiff does not allege possession of the land, and, consequently, the bill cannot be sustained to remove a cloud.

Section 6121 of the Oklahoma Statutes (Snyder's Statute, 1909), in force at the time plaintiff's bill was filed, is as follows:

> "An action may be brought by any person in possession, by himself or tenant, of real property, against any person who claims an estate, the interest therein, adverse to him, for the purpose of determining such adverse estate or interest."

Section 6122 of the Oklahoma Statutes (Snyder's Statutes, 1909), in force at the time plaintiff's bill was filed, is as follows:

> "In an action for the recovery of real property it shall be sufficient if the plaintiff state in his petition, that he has a legal or equitable estate therein, and is entitled to the possession thereof, describing the same, as required by Section 5667, and that the defendant unlawfully keeps him out of the possession. It shall not be

necessary to state how the plaintiff's estate or ownership is derived."

Plaintiff need not allege the source of his title.

32 Cyc. 1351;
Ely v. *New Mexico & A. R. Co.*, 129 U. S. Rep. 292, 32 L. Ed. 689;
Union Mill & Mining Co. v. *Warren*, 82 Fed. Rep. 519.

This statute does not enlarge the equitable rights and extend the remedies in equity which a court of the United States will enforce. This statute is merely declaratory of the general equity rule. This was held by the Circuit Court of Appeals of the United States for the Sixth Circuit, in an opinion by Justice DAY, then Circuit Judge, in the case of *Allegheny Oil Co.* v. *Snyder*, 106 Fed. Rep. 764.

See, also:

Backer v. *Penn Lubricating Co.*, 162 Fed. Rep. 627 (6 C. A. A.);
Darragh v. *Wetter Mfg. Co.*, 78 Fed. Rep. 7 (8 C. C. A.).

The plaintiff does not undertake in his bill to set out any cloud upon his title, but merely alleges "that the defendants and each of them claim and assert some right, title and interest in and to the said lands and particularly to said oil and natural gas deposits adverse to your orator, but the nature of said claims of said defendants is to your orator unknown."

This court expressly held, in *Devine* v. *Los Angeles*, 202 U. S. Rep. 315, 50 L. Ed. 1046, that the verbal assertions of ownership by defendant do not constitute a cloud upon title, to remove which the aid of a court of equity can be invoked.

The bill can, therefore, only be maintained upon the ground that it is a suit to enjoin a trespass, and, in drafting such bill, good pleading does not require plaintiff to state or allege anything further than title and right to the oil and gas deposits under a lease or deed, coupled with an allegation that the defendants had no title and were trespassing upon the plaintiff's rights, and, to the plaintiff's injury, destroying and removing and appropriating the mineral substances in said land.

It was wholly unnecessary to allege that the plaintiff derived his title under a departmental oil and gas mining lease approved by the Secretary of the Interior. And, even if such allegation was necessary, the fact that plaintiff's title emanated under a law of the United States does not present a Federal question under the authorities heretofore pointed out.

If the allegations that plaintiff claimed the oil and gas rights under a departmental oil and gas mining lease, approved by the Secretary of the Interior prior to the institution of a suit, presents a Federal question, then the Federal Court in Eastern Oklahoma will be open to all the lessees holding approved departmental oil and gas mining leases for any action they may desire to institute against other parties, for the purpose of enjoining trespassers upon their rights and restraining the extraction and removal of these mineral substances.

A resort to the record in this case will show that the rules and regulations were not involved, even on the merits, and that the decisions of neither court were based upon either the terms of the lease or upon the rules and regulations.

POINT SEVEN.

The bill of intervention filed by George Franklin Berryhill, intervenor, did not and could not import into the case a Federal question, so as to confer jurisdiction on the Circuit Court of the United States or deprive the judgment and decree of the Circuit Court of Appeals of finality.

In the recent case of *St. Louis, K. C. & C. R. R. Co.* v. *W. R. R. Co.* 217 U. S. Rep. 247, this court held that jurisdiction in the case of an intervention is determined by that of the main case, and, where there was no Federal question presented in the main case, the intervention did not and could not add to the jurisdiction of the court.

POINT EIGHT.

The allegation in the bill "that the defendant Kiefer Oil & Gas Company is a corporation duly organized on the 26th day of April, 1907, under and by virtue of the laws of the United States in force in Indian Territory, having its principal place of business in said Territory, (and) that said defendant existed under the laws of said Territory and was a citizen of said Territory up to and including November 16, 1907, (and) that at all times since the admission of Oklahoma as a state, said defendant has been and now is a citizen and a resident of said State of Oklahoma, and a citizen and resident of the Eastern District of Oklahoma," did not present a Federal question, and does not show that the controversy arises under the Laws or Constitution of the United States.

(a) It does not appear from this allegation that The Kiefer Oil & Gas Company was, at the time this suit was instituted, a corporation *existing* under and by virtue of the laws of the United States in force in the Indian Territory. It is alleged that The Kiefer Oil & Gas Company is a corporation, and that it was duly organized on the 26th day of April, 1907, under and by virtue of the laws of the

United States in force in the Indian Territory, and having its principal place of business in said Territory. Then it is alleged that the defendant existed under the laws of said Territory, and was a citizen of said territory "*up to and including November 16, 1907.*" Following this, it is then alleged: "that at all times since the admission as a State, said defendant has been and now is a citizen and resident of said State of Oklahoma and a citizen and resident of the Eastern District of Oklahoma."

It, therefore, does not clearly appear that, since the admission of Oklahoma as a state, the defendant, The Kiefer Oil & Gas Company, has continued to exist and operate and do business as a corporation organized under the laws of the United States in force in the Indian Territory (Record, page 4).

While the answer cannot be resorted to for the purpose of determining this jurisdictional question, nevertheless, defendants admit "that said defendant corporation, since the admission of the State of Oklahoma into the Union, has been and now is a domestic corporation of the State of Oklahoma, with its principal place of business in the Eastern District of said State."

In *Union Pacific R. Co.* v. *Harris*, 158 U. S. Rep. 327; 39 L. Ed. 1003, the allegation in the complainant's bill was that "the Union Pacific Railway Company, defendant, which was heretofore and *now is* duly chartered and organized under and by virtue of the laws of the United States, and having its principal place of business in the City of Omaha, and State of Nebraska, and is now and was at all the time and times hereinafter stated, a citizen of the State of Nebraska."

In that case the allegation was that the Railroad Company "now is duly chartered and organized under and by virtue of the laws of the United States."

Here, the allegation in this case is that The Kiefer Oil & Gas Company "existed under the laws of said Territory and was a citizen of said Territory up to and including November 16, 1907;" and, further, "that at all times since the admission of Oklahoma as a State, said defendant has been and now is a citizen and resident of said State of Oklahoma, and a citizen and resident of the Eastern District of Oklahoma."

It, therefore, does not appear that the defendant, The Kiefer Oil & Gas Company was, at the time this suit was instituted, existing as a corporation organized under the laws of the United States in force in the Indian Territory. Invoking the rule that the Federal question must be clearly presented by the pleadings and not left to argument and inference, we contend that the allegation in the plaintiff's bill is not sufficient to show that The Kiefer Oil & Gas Company was, at the time the bill was filed, a corporation existing under the laws of the United States in force in the Indian Territory.

The fact that it was originally organized on the 26th day of April, 1907, under the laws of the United States in force in the Indian Territory, is not, in the slightest, inconsistent with its existence after Statehood as a domestic corporation existing under the laws of the State of Oklahoma. It is admitted in the answer that it is a domestic corporation. How it became a domestic corporation is not disclosed by the pleadings, and is immaterial in this case.

In fact, the Union Pacific Railroad was organized under a special Act of Congress, and the Northern Pacific Railroad Company was created by an Act of Congress approved March 2, 1864 (13 St. L. 365). These corporations were national in their character, and were great transcontinental carriers.

This court would take judicial notice of an Act of Congress specially providing for the organization of a corporation, but would hardly take judicial notice of the corporate existence of The Kiefer Oil & Gas Company organized under an Act of Congress purely local in its nature and confined territorially to the Indian Territory.

(b) We have no quarrel to make with the opinion of Mr. Chief Justice MARSHALL, in *Osborn* v. *United States Bank*, 9 Wheat. 738; 6 L. Ed. 204, but we contend that the reasoning of the court there has no application to the condition here.

Under the many decisions of this court holding that it must clearly appear that the controversy substantially involves the construction and application of some law of the United States or the Constitution, it is difficult to see from the standpoint of a layman and ordinary lawyer how it can be said that a case arises under the laws and Constitution of the United States because one of the parties happens to be a corporation organized under a law of the United States. Especially so, in the absence of some allegation showing that the charter of the corporation is open to construction, and its powers thereunder involved.

In *Union Pacific R. Co.* v. *Harris*, *supra*, the reluctance of this court to follow the old decisions, or at least to extend the doctrine, is shown by the language of Mr. Chief Justice FULLER. He says: "It is not for us to inquire why writs of error to Circuit Courts of Appeals in actions for damages for neglect of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States, in a suit whose objective was to relieve an over-burdened court, since such is the effect of thes uit according to its plain language. Nevertheless as plaintiff below appears to have really proceeded on the

ground of diverse citizenship, we think there was color for the motion to dismiss, etc."

We know of no better argument to offer in support of our contention, that the allegation that The Kiefer Oil & Gas Company was organized under the laws of the United States in force in the Indian Territory does not present a case arising under the laws of the United States or the Constitution, than that of Judge RALPH E. CAMPBELL, District Judge for the Eastern District of the State of Oklahoma, in the case of *Boyd* v. *Great Western Coal & Coke Company*, delivered on July 17, 1911, and reported in 189 Fed. Rep. 115, Advance Sheet for October 19, 1911. And, inasmuch as the bound volume may not be out before this case is reached, we herewith set out in full the opinion of Judge CAMPBELL in that case:

BOYD ET AL. *v.* GREAT WESTERN COAL & COKE CO.

(Circuit Court, E. D. Oklahoma. July 17, 1911.)

No. 1,435.

1. REMOVAL OF CAUSES (§ 25*)—FEDERAL QUESTION.

While defendant may set up a federal question as a defense to an action in the state court and on an adverse ruling may test the question in the Supreme Court of the United States by writ of error, the case cannot be removed to a federal court from the state court because involving a federal question, appearing only from the facts alleged in the petition for removal, and not from plaintiff's statement of his case in his complaint of petition.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 58, 59; Dec. Dig. § 25*.]

2. REMOVAL OF CAUSES (§ 19*)—GROUND—FEDERAL QUESTION—"FEDERAL CORPORATION."

Act Feb. 18, 1901, c. 379, 31 Stat. 794, extended over Indian Territory certain laws of Arkansas relat-

ing to corporations making the Arkansas law a part of the act of Congress as though incorporated therein in *haec verba. Held,* that a private corporation organized in Indian Territory under such law prior to statehood was not a federal corporation in the sense of being incorporated under a federal law so as to authorize it to remove actions against it in the state courts after the territory became a state.

[Ed. Note.—For other cases, see Removal of Causes, Cent. Dig. §§ 37-48; Dec. Dig. § 19.*]

At Law. Action by Maggie Boyd and others against the Great Western Coal & Coke Company. On motion to remand. Granted.

H. H. Smith, for plaintiffs.

James H. Gordon, for defendant.

CAMPBELL, District Judge. The matter now before the court in this case arises on plaintiff's motion to remand this cause. This is a suit for damages for the death of the husband and father of plaintiffs, while engaged by defendant as a coal miner, originally instituted in the district court of Latimer County, Okla. Plaintiff's petition charged that the defendant is a domestic corporation organized under the laws of Oklahoma, and alleges as grounds of recovery various failures on the part of defendant to comply with the state laws regulating the operation of coal mines. In due time the defendant filed in the state court its petition and bond for removal to this court, alleging that it is a corporation other than a banking corporation incorporated under the laws of the United States of America on the 22d day of July, 1902, and now operating under such laws, and, as such, is a federal corporation, and has a defense to this suit arising under and by virtue of the laws of the United States, to-wit, its act of incorporation.

In the petition for removal it is further pointed out that the various breaches of duty relied upon in the petition arise from the alleged failure of the defendant

to comply with certain provisions of the state laws relating to coal mines, and that the defendant is operating under leases from the United States, pursuant to certain rules and regulations prescribed in connection therewith, and under certain acts of Congress, relating thereto, with which the requirements of said state laws conflict, or act in derogation thereof, or imposing upon defendant additional burdens, all of which, it is contended, the state is without power to do, and that the determination of defendant's liability in this cause depends upon the construction of the federal and state statutes referred to.

(1) But a perusal of the plaintiff's petition fails to disclose any such federal question, and it is now settled that in such case, while the defendant may set up a federal question as a defense to the action in the state court, and on adverse ruling thereon by the highest state court may test the question in the Supreme Court on writ of error to the state court, the cause cannot be removed from the state court to a federal court unless the plaintiff's statement of his case in his complaint or petition necessarily discloses such federal question, and, if it does not so appear, the want cannot be supplied by any statement in the petition for removal. *Chappel* v. *Waterworks,* 155 U. S. 102, 15 Sup. Ct. 34, 39 L. Ed. 85; *Texas & Pacific R. R. Co.* v. *Cody,* 166 U. S. 606, 17 Sup. Ct. 703, 41 L. Ed. 1132. Therefore unless the defendant is a corporation organized and existing under the laws of the United States, in such sense as to bring it within those decisions of the Supreme Court relating to the right of removal of causes by federal corporations, the motion to remand must be sustained.

(2) By Act Cong. Feb. 18, 1901, c. 379, 31 Stat. 794, certain provisions of the law of Arkansas relating to corporations were extended over and put in force in Indian Territory with such substitution of terms as to make them applicable. Prior to this act no provision of law existed for the creation of corporations for the conduct of business in its nature local to Indian Terri-

tory. By the adoption of the sections of the Arkansas law specified a complete system of laws for the creation and control of corporations within the Indian Territory was provided. While it was accomplished by an act of Congress, and the sections of the Arkansas law adopted became as much a part of the act as if set forth in *haec verba* therein, it was in effect very similar to the laws of the several states relating to the creation and control of domestic corporations, in that its operation was confined to the territory comprised within what was known as Indian Territory. The defendant was organized as an Indian Territory corporation prior to statehood under the terms of the foregoing act, and contends that it thereby became and is a federal corporation, organized and existing under the laws of the United States, and, as such, is entitled to remove this cause to this court. This presents the question as to whether a corporation organized under the laws in force in Indian Territory may, after statehood, when made defendant in a cause in a state court involving the jurisdictional amount, remove the same to the federal court solely on the ground that it is a corporation organized and existing under the laws of the United States. In behalf of its contention the defendant cites, among other authorities, *Canary Oil Co.* v. *Standard Asphalt Co.* (C. C.), 182 Fed. 663, from the Circuit Court for the District of Kansas, wherein this question was presented and the right of removal upheld by that court. As suggested in that opinion, the question is whether these corporations originally organized under the laws of Indian Territory may now be said to be corporations organized and existing under the laws of the United States in such sense that causes in which they are defendants may be removed from a state to a federal court solely on the ground that, by reason of their original creation under the general act of Congress providing for corporations in Indian Territory, such cases may be said to arise under the laws of the United States, as contradistinguished from suits to which corporations created under the laws of an organized territory may be parties.

The effect of the intervention of statehood upon corporations created under the laws of an organized territory is thus tersely stated by Justice FIELD in *Kansas Pacific R. Co.* v. *Atchison, etc., R. Co.*, 112 U. S. 414, 5 Sup. Ct. 208, 28 L. Ed. 794:

> "The admission of Kansas as a state into the Union, and the consequent change of its form of government, in no respect affected the essential character of the corporations or their powers or rights. They must after that change be considered as corporations of the state, as much so as if they had derived their existence from its legislation. As its corporations they are to be treated, so far as may be necessary to enforce contracts or rights of property by or against them, as citizens within the clause of the Constitution declaring the extent of the judicial power of the United States. It has been expressly held that they are to be so considered when they have controversies with citizens of other states. And the same course of reasoning which led to this decision must also lead to the conclusion that in all cases where a federal court can take jurisdiction of like controversies between corportaions, and treat them as citizens of the state under whose laws they were created or continue to exist."

It follows that if Congress had seen fit to provide by organic act for a territorial form of government in Indian Territory, and the Legislature of the territory so established had enacted a law providing for domestic corporations, and the defendant had been organized under that law, rather than a direct act of Congress, there would be no question of its status now as a domestic corporation of the state, and, of course, could not remove this case to this court, for a corporation organized under the laws of a territory is not a federal corporation, not being organized under the laws of the United States. *Maxwell* v. *Federal Gold & Copper Co.*, 155 Fed. 110, 83 C. C. A. 570, and cases cited. So that, as suggested, the question here is whether the fact that

Indian Territory corporations were organized under direct legislation of Congress, rather than territorial acts, constitutes them federal corporations, and makes any case to which any one of them may be now a party one arising under the laws of the United States, and cognizable in or removable to a federal court, notwithstanding Congress has since by the enabling act (June 16, 1906, c. 3335, 34 Stat. 275 [U. S. Comp. St. Supp. 1909, p. 154]) provided for the admission of the Indian Territory as a portion of the sovereign state of Oklahoma.

Now let us see what precisely is the relation of a territorial government to the general government. That question is so fully answered by Mr. Justice BRADLEY in *Mormon Church* v. *United States*, 136 U. S. loc. cit. 42, 10 Sup. Ct. 802, 34 L. Ed. 478, that I cannot do better than quote his language. Prior to the organization of the territory of Utah, the Mormons had set up there a provisional government, known as the "State of Deseret," by the legislature of which an act was passed incorporating "The Church of Jesus Christ of Latter Day Saints." After the organization of the territory, the territorial Legislature, by certain acts, gave validity to this corporation. Thereafter Congress passed acts abolishing polygamy, and disapproving and annulling the act incorporating the church and the acts of the territorial Legislature validating the same. The power of Congress to so legislate was attacked, and of its validity Justice BRADLEY said:

> "The power of Congress over the territories of the United States is general and plenary, arising from and incidental to the right to acquire the territory itself, and from the power given by the Constitution to make all needful rules and regulations respecting the territory or other property belonging to the United States. It would be absurd to hold that the United States has power to acquire territory, and no power to govern it when acquired. The power to acquire territory other than the territory northwest

of the Ohio river (which belonged to the United States at the adoption of the Constitution) is derived from the treaty-making power or the power to declare and carry on war. The incidents of these powers are those of national sovereignty, and belong to all independent governments. The power to make acquisitions of territory by conquest, by treaty, and by cession is an incident of national sovereignty. The territory of Louisiana, when acquired from France, and the territories west of the Rocky Mountains, when acquired from Mexico, became the absolute property and domain of the United States, subject to such conditions as the government in its diplomatic negotiations had seen fit to accept relating to the rights of the people then inhabiting those territories. Having rightfully acquired said territories, the United States government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any such right of sovereignty over them; no other country or government had any such right. These propositions are so elementary, and so necessarily follow from the condition of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident. Chief Justice MARSHALL in the case of the *American Insurance Co.* v. *Canter*, 1 Pet. 511, 542 [7 L. Ed. 242], well said: 'Perhaps the power of governing a territory belonging to the United States, which has not by becoming a state acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular State, and is within the power and jurisdiction of the United States. The right to govern may be the inevitable consequence of the right to acquire territory. Which ever may be the source whence the power is derived, the possession of it is unquestioned.' And Mr. Justice NELSON delivering the opinion of the court in *Benner* v. *Porter*, 9 How. 235, 242 [13 L. Ed. 119], speaking of the

territorial governments established by Congress, says: 'They are legislative governments, and their courts legislative courts, Congress, in the exercise of its powers in the organization and government of the territories, combining the powers of both the federal and state authorities.' Chief Justice WAITE in the case of *National Bank* v. *County of Yankton*, 101 U. S. 129, 133 [25 L. Ed. 1046], said: 'In the organic act of Dakota there was not an express reservation of power in Congress to amend the acts of the territorial Legislature, nor was it necessary. Such a power is an incident of sovereignty, and continues until granted away. Congress may not only abrogate laws of the territorial Legislatures, but it may itself legislate directly for the local government. It may make a void act of the territorial Legislature valid, and a valid act void. In other words, it has full and complete legislative authority over the people of the territories and all the departments of the territorial governments. It may do for the territories what the people, under the Constitution of the United States, may do for the states.' In a still more recent case and one relating to the legislation of Congress over the territory of Utah itself (*Murphy* v. *Ramsey*, 114 U. S. 15, 44 [5 Sup. Ct. 747, 763, 29 L. Ed. 47]), Mr. Justice MATTHEWS said: 'The counsel for the appellants in argument seem to question the constitutional power of Congress to pass the act of March 22, 1882, so far as it abridges the rights of electors in the territory under previous laws. But that question is, we think, no longer open to discussion. It has passed beyond the stage of controversy into final judgment. The people of the United States as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion, they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the Constitution, or are necessarily implied in its

terms.' Doubtless Congress in legislating for the territories would be subject to those fundamental limitations in favor of personal rights which are formulated in the Constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the Constitution from which Congress derives all its powers than by any express and direct application of its provisions. The supreme power of Congress over the territories and over the acts of the territorial Legislatures established therein is generally expressly reserved in the organic act establishing governments in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah approved September 9, 1850, it is declared 'that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this act. * * * All the laws passed by the Legislative Assembly and Governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect.' 9 Stat. 454."

In *Snow* v. *United States*, 18 Wall., loc. cit. 319, 320, 21 L. Ed. 784, it is said:

"The government of the territories of the United States belongs, primarily, to Congress; and, secondarily, to such agencies as Congress may establish for that purpose. During the term of their pupilage as territories, they are mere dependencies of the United States. Their people do not constitute a sovereign power. All political authority exercised therein is derived from the general government. It is, indeed, the practice of the government to invest these dependencies with a limited power of self-government as soon as they have sufficient population for the purpose. The extent of the power thus granted depends entirely upon the organic act of Congress in each case, and it is at all times subject to such alter-

ations as Congress may see fit to adopt. * * * Strictly speaking, there is no sovereignty in a territory of the United States, but that of the United States itself. Crimes committed therein are committed against the government and dignity of the United States. It would seem that indictments and writs should regularly be in the name of the United States, and that the attorney of the United States was the proper officer to prosecute all offenses. But the practice has been otherwise, not only in Utah, but in other territories organized upon the same type."

In *Sims* v. *Sims,* 175 U. S., loc. cit. 168, 20 Sup. Ct. 60, 44 L. Ed. 115, it is said:

"In the territories of the United States, Congress has the entire dominion and sovereignty, national and local, federal and state, and has full legislative power over all subjects upon which the Legislature of a state might legislate within a state, and may, at its discretion, intrust that power to the legislative assembly of a territory."

In *Binns* v. *United States,* 194 U. S. 491, 24 Sup. Ct. 817, 48 L. Ed. 1087, Justice BREWER said:

"It must be remembered that Congress, in the government of the territories as well as of the District of Columbia, has plenary power, save as controlled by the provisions of the Constitution, that the form of government it shall establish is not prescribed, and may not necessarily be the same in all the territories. We are accustomed to that generally adopted for the territories of a *quasi* state government, with executive, legislative, and judicial officers, and a Legislature endowed with the power of local taxation and local expenditures, but Congress is not limited to this form. In the District of Columbia it has adopted a different mode of government, and in Alaska still another. It may legislate directly in respect to the local affairs of a territory or transfer the power of such legislation to a Legislature elected by the citizens of the territory. It has pro-

vided in the District of Columbia for a board of three commissioners, who are the controlling officers of the district. It may intrust to them a large volume of legislative power, or it may by direct legislation create the whole body of statutory law applicable thereto. For Alaska Congress has established a government of a different form. It has provided no legislative body, but only executive and judicial officers. It has enacted a penal and civil code. Having created no legislative body and provided no local legislation in respect to the matter of revenue, it has established a revenue system of its own, applicable alone to that territory. Instead of raising revenue by direct taxation upon property, it has, as it may rightfully do, provided for that revenue by means of license taxes."

From the foregoing authorities, it appears that the Legislatures of the several organized territories are mere agencies of Congress, for the purpose of representing it locally in making laws for the government of their internal affairs. The act of a territorial Legislature providing for the creation of domestic corporations, while not in form a direct act or law of Congress, it seems to me is not essentially different from direct congressional legislation to that end, because it is the act of a congressional agency established by Congress to relieve it of the burden of such local legislation. But the Legislature is still only its agent, and nothing more, and Congress may at any time step in and legislate directly with regard to any matter of local concern. Suppose in one of the organized territories Congress should exercise its right to legislate directly regarding the creation of corporations within its territorial limits, as it did within the territorial limits of the unorganized Indian Territory and abolish all prior territorial legislation on the subject, and thereafter corporations should be organized under the act and then such territory should become a state, could it be successfully contended that such corporations, after statehood, were federal corporations, rather than corpora-

tions of the state, as held in *Kansas & Pacific R. Co.* v. *Atchison R. R. Co., supra?* I think not. If a Legislature of an organized territory is merely a congressional agency for the enactment of laws local to the territory, and in the establishment of such agency Congress still retains the right at any time to legislate directly upon any subject of local concern, what essential difference is there between the legislation of the agent, the territorial Legislature, and that of the principal, Congress? I can conceive of none. If, then, the only difference between an organized and unorganized territory, as regards necessary local legislation, is that in the former Congress, while retaining its power to legislate directly has for its own convenience established a local legislative agency, to enact such legislation as it may not see fit to directly enact, while in the latter all local legislation comes directly from Congress, what essential difference could there be between the direct legislation of Congress controlling a matter of local concern within an organized territory, and such legislation controlling a matter of local concern within an unorganized territory? Manifestly none. In the *Pridgeon* case, 153 U. S. 48, 14 Sup. Ct. 746, 38 L. Ed. 631, the court said:

> "But it is suggested on behalf of the United States that the provisional and temporary adoption by Congress of the Nebraska Criminal Code for the Territory of Oklahoma had the effect of making larceny or horse stealing an offense against the United States punishable on the federal side of the courts of the territory. The Supreme Court of the territory has held that the Criminal Code of Nebraska, established by Congress, was to be treated as if it had been enacted by the territorial Legislature, and was to be dealt with as if the crimes thereby declared were crimes not against the United States, but against the territory. Thus in *ex parte Larkin*, 1 Okla. 53, 57 [25 Pac. 745, 746, (11 L. R. A. 418)], GREEN, C. J., says: 'It was intended by Congress that the laws of Nebraska should constitute a territorial code, as dis-

tinguished from the laws of the United States in force in the territory of Oklahoma, and that they should sustain the same relations to the courts and to the people of the territory and to the legislative assembly as a code of laws enacted by the legislative assembly.' If, as suggested by counsel for the government, Section 11 of the Act of May 2, 1890, c. 182 [26 Stat. 81], could be treated as establishing the provisional criminal code therein mentioned, as a law of the United States, and as creating offenses against the federal government, pending the first session and adjournment of the Oklahoma Legislature, so as to make horse stealing during that time a crime, not against the territorial government, but against the United States, the proceeding on the federal side of the court was entirely lawful, the sentence of five years, as well as the imposition of 'hard labor,' being authorized by the Nebraska Criminal Code as above quoted. It was certainly competent for Congress to have adopted the Criminal Code of Nebraska so as to make horse stealing a crime against the United States in the Oklahoma Territory, just as by Section 5391, Revised Statutes [U. S. Comp. St. 1901, p. 3651], it has adopted the Penal Code of the states in respect to offenses committed in forts, dock yards, navy yards, and other places ceded to the United States, where the offense is not prohibited, or the punishment thereof is not specially provided for by any law of the United States. But we are of opinion that the Supreme Court of the territory in *ex parte Larkin* has taken the proper view of the effect of Section 11 of the Act of May 2, 1890, in holding that the laws of Nebraska were adopted as a territorial code, and, this being so, a court of the United States did not have jurisdiction of the offense of horse stealing within the territorial limits of Oklahoma under the act of May 2, 1890, or by the virtue of the Nebraska Criminal Code, provisionally adopted for the territory."

The case to which all later decisions involving the question of removal of causes by federal corporations mainly refer is that of *Osborn* v. *United States Bank,* 9 Wheat, 738, 6 L. Ed. 204, decided by Chief Justice MARSHALL. The bank was organized under special act of Congress, and the question was as to the validity of that portion of the act expressly giving the bank the power to sue and be sued in the court of the United States, and the determination of that question was held to rest upon the question as to whether the case was one arising under a law of the United States, because of the fact of its existence under an Act of Congress. The court held that it was such a case, saying:

"The case of the bank is, we think, a very strong case of this description. The charter of incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to make contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of a law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law? * * * It is said that a clear distinction exists between the party and the cause; that the party may originate under a law with which the cause has no connection; and that Congress may, with the same propriety give a naturalized citizen, who is the mere creature of law, a right to sue in the courts of the United States, as give that right to the bank. This distinction is not denied; and if the Act of Congress was a simple act of incorporation, and contained nothing more, it might be entitled to great consideration. But the act does not stop with incorporating the bank. It proceeds to bestow upon the being it has made, all the faculties and capacities which that being possesses. Every act of the bank grows out of this law, and is

tested by it. To use the language of the Constitution, every act of the bank arises out of this law. A naturalized citizen is, indeed, made a citizen under an Act of Congress, but the act does not proceed to give, to regulate, or to prescribe his capacities. He becomes a member of the society, possessing all the rights of a native citizen, and standing, in the view of the Constitution, on the footing of a native. The Constitution does not authorize Congress to enlarge or abridge those rights. The simple power of the national Legislature is to prescribe a uniform rule of naturalization, and the exercise of this power exhausts it, so far as respects the individual. The Constitution then takes him up, and, among other rights, extends to him the capacity of suing in the courts of the United States precisely under the same circumstances under which a native might sue. He is distinguishable in nothing from a native citizen; except so far as the Constitution makes the distinction. The law makes none. There is, then, no resemblance between the act incorporating the bank and the general naturalization law."

In the *Pacific Railroad Removal Cases*, 115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319, wherein was raised the question of the right of the several railroad companies, organized under Acts of Congress, to remove suits instituted against them in the state courts to the federal courts, the court reviewed *Osborn* v. *Bank, supra*, and, after quoting the foregoing portion of the opinion in that case, said:

> "If the case of *Osborn* v. *Bank* of the United States is to be adhered to as a sound exposition of the Constitution, there is no escape from the conclusion that these suits against the plaintiffs in error, considering the said plaintiffs as corporations created by and organized under the Acts of Congress referred to in the several petitions for removal in these cases, were and are suits arising under the laws of the United States. An examination of those Acts

of Congress shows that the corporations now before us, not only derive their existence, but their powers, their functions, their duties, and a large portion of their resources, from those acts, and by virtue thereof sustain important relations to the government of the United States."

In the case of the bank above referred to, it is noted that its operation was of national extent and was closely related to the fiscal affairs of the government, and as said by the court, *supra*, the railroads not only derived their existence, but their powers, their functions, their duties, and a large part of their resources from the acts incorporating them, and by virtue thereof sustain important relations to the government. And this, I think, will be found to be characteristic of most federal corporations whose cases the Supreme Court has held to arise under a law of Congress solely by reason of the federal character of the acts creating them. A notable exception is *Knights of Pythias* v. *Kalinski*, hereafter referred to. But in the case of these Indian Territory corporations there is nothing to give them any national character or function unless it be the simple fact that their incorporation is under an Act of Congress, and as suggested by Chief Justice MARSHALL, in the *Bank* case, where it is simply an act of incorporation, it may well be questioned whether this alone gives the creatures of the act the national character necessary to entitle them to remove their causes to the federal courts. Aside from the fact that they are created under an Act of Congress, there is nothing which distinguishes them from ordinary domestic corporations of the state or an organized territory. The operation of the act was confined to Indian Territory. The domicile of the corporation organized under it was to be Indian Territory, and not elsewhere. The purpose of their organization was for the transaction of business of an entirely local character, having no more relation, necessarily, to national governmental affairs than a private business of any individual resident of the Indian Territory, and, in fact, the sole purpose of

the act was to give to corporations the right to engage locally in the Indian Territory in certain kinds of business, the same as individuals. As said by Justice FIELD in the *Kansas Pacific* case, *supra:*

> "A private corporation is, in fact, but an association of individuals united for a lawful purpose and permitted to use a common name in their business, and to have a change of members without dissolution. * * * The grant of incorporation is to bestow the character and properties of individuality on a collective and changing body of men."

A corporation therefore is entirely a creature of legislation. Congress saw fit to permit their creation in Indian Territory. Not having provided for a local Legislature, it provided for direct legislation for their existence. But their character and sphere of operation was in no sense different in essential respects from that of corporations created under the laws of Oklahoma Territory.

The case of *Knights of Pythias* v. *Kalinski*, 163 U. S. 289, 16 Sup. Ct. 1047, 41 L. Ed. 163, was an action begun by the plaintiff in a state court of Louisiana on a policy of life insurance issued by the defendant upon her husband's life. The defendant is a benevolent organization, having an insurance feature, domiciled in Washington, D. C., organized under a general Act of Congress, and the cause was removed to the Circuit Court of the United States for the Eastern District of Louisiana on the theory that it was a federal corporation, and that the cause was therefore one arising under the laws of the United States. It does not appear that the jurisdiction of the federal court was questioned, and the Supreme Court assumes jurisdiction without comment, and passes upon the merits of the case, treating the defendant as a federal corporation. An examination of Act Cong. May 5, 1870, c. 80, 16 Stat. 98, under which the order of Knights of Pythias was organized, shows that it is a general incorporation act, providing for the organization of charitable, benevo-

lent, business and railroad corporations within the District of Columbia. In this respect the act resembled the Indian Territory corporation act now being considered. The authority of Congress to enact this general incorporation law of the district is found in that clause of Section 8 of Article 1 of the federal Constitution, reading:

> "To exercise exclusive legislation in all cases whatsoever over such district (not exceeding ten miles square), as * * * may become the seat of government of the United States."

It is observed from this constitutional provision that by it the several states relinquished any rights of government any of them might have over any ten miles square of territory which might at any time in the future become the site of the federal government, and gave to Congress exclusive control thereof. This control is not, as in the territories, organized or unorganized, only temporary and with a view of ultimate statehood, but in the nature of things is perpetual, and shall exist so long as the government exists under the Constitution. In the *Kalinski* case the act of incorporation was not only a congressional act, but at the time the suit was instituted and tried this exclusive congressional control still existed. No change had taken place, as in the case at bar, whereby the congressional authority to so legislate had been by Congress itself granted to the local state government.

On the other hand, as we have seen from the *Mormon Church* case, *supra*, the power of Congress to enact the law in question relating to corporations in Indian Territory arose from the power to acquire territory, and the authority given by the Constitution (Art. 1, § 8) to make all "needful rules and regulations" respecting the territory belonging to the United States. All such laws in the nature of "needful rules and regulations," so far as they relate to territories, organized and unorganized, are of necessity to be of only temporary application, and in each instance have served

their purpose when the particular territory to which they apply becomes a state. For several years before the date of this Indian Territory incorporation act, Congress had been enacting laws looking to ultimate statehood, and this act was manifestly passed by Congress for the purpose only of providing a means of incorporation until statehood, just as a territorial Legislature in an organized territory might do pending statehood. By the enabling act subsequently passed, Congress has now provided for a state, and has thereby relinquished its right to create or control corporations local to the state.

In my opinion there is no fundamental difference between a law passed by a territorial Legislature, pursuant to authority delegated to it by Congress, and a law of a similar character, local to a territory, whether organized or unorganized, which Congress, in the absence of a territorial Legislature, directly enacts. They are each the result of the exercise by Congress of its power to make "needful rules and regulations" for the territory of the United States, exerted in the one instance indirectly, in the other directly. In the *Pridgeon* case Congress extends a law of Nebraska over Oklahoma Territory for a local purpose. In this case Congress extends a law of Arkansas over Indian Territory for a local purpose. The latter was no more a general law of the United States than was the former, and was not in my judgment intended by Congress to be different in effect from the similar local incorporation act passed by the Legislature of Oklahoma Territory intrusted by it with the power to so legislate for that territory. While the act providing for corporations in Indian Territory was a direct Act of Congress, and emanating as it did from the national Legislature was a law of the United States, as were all the statutory provisions adopted from Arkansas in force in Indian Territory, they were intended by Congress to comprise only a local system of laws for the govern-

ment of the unorganized territory until such time as statehood should be granted, it being manifest from other contemporaneous congressional legislation which must also be considered that ultimate statehood was at all times contemplated. So that, as in the *Pridgeon* case, *supra,* a direct Act of Congress adopting certain Nebraska criminal laws was not given the effect of a law of the United States, the violation of which was cognizable on the federal side of the court, but rather considered as a territorial law only, so also must the laws adopted from Arkansas for the local government of Indian Territory be considered as territorial laws, rather than as laws of the United States in the sense that being involved in any way in a case filed now, after statehood, they may constitute it a case "arising under the laws of the United States." It must be borne in mind that the Act of Congress under which these Indian Territory corporations were created had served its purpose when the Indian Territory became a state, and, like other laws put in force in Indian Territory by Congress, has been by the force of the enabling act and statehood superseded by state laws. I cannot escape the conclusion that Congress intended that these incorporation laws of Arkansas extended over Indian Territory should serve identically the same purpose as to Indian Territory that the territorial incorporation laws of Oklahoma Territory served in that territory, and that Congress intended that, after the State of Oklahoma should be admitted into the Union, the corporations of Oklahoma Territory and of Indian Territory should have exactly the same status so far as the jurisdiction of the federal court is concerned, and that there is no more reason or authority for holding that a case now filed since statehood may be removed to the federal court solely because the defendant is a corporation originally organized under the laws in force in Indian Territory than there is for removing a case solely because the defendant is a corporation originally organized under the laws of Oklahoma Territory, and

it is settled by the authorities heretofore cited that in the latter case a removal may not be had.

The motion to remand will, therefore, be sustained, and the cause remanded to the state court.

We, therefore, respectfully contend that the decision and decree of the Circuit Court of Appeals for the Eighth Circuit was final under Section 6 of the Act of 1891, and that the appeals in this case taken by the plaintiff, A. W. Shulthis, and the intervenor, George Franklin Berryhill, should both be dismissed.

Respectfully submitted,

PRESTON C. WEST,

GEO. S. RAMSEY,

Counsel for Appellees Making This Motion.

In the

SUPREME COURT *of the* UNITED STATES

October Term, 1911.

NUMBER 156.

ALBERT W. SHULTHIS, *Appellant,*

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, *The* KIEFER OIL & GAS COMPANY *and* GEORGE FRANKLIN BERRYHILL, *Appellees.*

NUMBER 157

GEORGE FRANKLIN BERRYHILL, *Appellant,*

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY *and The* KIEFER OIL & GAS COMPANY, *Appellees.*

REPLY BRIEF ON BEHALF OF ALBERT W. SHULTHIS,

May It Please the Court:

In view of the fact that the brief of the appellees herein presents certain contentions and citations not apparently relied upon by appellees in the Circuit Court for

the Eastern District of Oklahoma, or in the Circuit Court of Appeals for the Eighth Circuit, and further in view of the fact that certain decisions have been handed down by the courts in the State of Oklahoma subsequent to the writing of our brief in chief herein, we offer this reply brief on behalf of the appellant, Albert W. Shulthis, and ask consideration of it by this Honorable Court.

Counsel for appellees in their brief at pages 77 to 111 inclusive, devote much thought and ingenious labor to escape the plain language and the plain meaning of Section 22 of the Act of April 26, 1906 (34 Stat. L., 137).

It will be remembered that under the provisions of Section 16 of the Act of June 30, 1902 (32 Stat. L., 500), the lands in the case at bar were not alienable by George Franklin Berryhill, the father of Andrew J. Berryhill, and were not at the time appellees insist that they took title to the said lands, unless they were made alienable by virtue of Section 22 of the Act of April 26, 1906 (34 Stat. L., 137). That section, it will be remembered, is as follows:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, may sell and convey the lands *inherited* from such decedent; and if there be both adult and minor heirs of such decedent, then such minors may join in a sale of such lands by a guardian duly appointed by the proper United States Court for the Indian Territory. And in case of the organization of a State or Territory, then by a proper court of the County in which said minor or minors may reside, or in which said real estate is situated, upon an order of such court made upon petition filed by guardian. All conveyances made under this provision by

> heirs who are full-blood Indians are to be subject to the approval of the Secretary of the Interior, under such rules and regulations as he may prescribe."

Counsel for appellees treat that section as though the only phrase which is material to the consideration of the question was the one, to-wit, "may sell and convey the lands inherited from such decedent," and insist that said section removed "the restrictions upon mixed blood heirs of deceased Indians, without any regard to technicalities, and without any regard to whether the heirs acquired the lands by inheritance or by descent, technically speaking, or as the successors of a deceased citizen and as donees." (Page 84, brief.)

A cursory glance, however, will demonstrate that in addition to the condition that lands must be "inherited from such decedent," there are at least one of two conditions which must have occurred with reference to the lands before the restrictions against alienation may be considered as removed.

Before the restrictions against the alienation of lands may be considered to have been removed under Section 22, it must appear either *(1)* that the deceased Indian must have made his selection in his lifetime; or *(2)* that a deed or patent had been made to him during his lifetime. This is apparent, as hereinbefore stated, from the express language of that section. Witness the language:

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes *whose selection has been made* or *to whom a deed or patent has been issued for his or her share of the land of the tribe,* may sell and convey, etc."

It clearly appears from the record in this case that neither of these conditions have ever been met. They never have existed. It appears from the record that

"Andrew J. Berryhill, the deceased mentioned in the pleadings, * * * died on the .... day of November, A. D., 1901." (Pr. Tr., p. 201.)

It further appears that the name of Andrew J. Berryhill, the deceased, was not placed on the roll until October 8, 1902 (Pr. Tr., p. 201). The name of Andrew J. Berryhill not having been placed on the rolls until about one year after his death, it is clear that he, in his lifetime, nor any one for him during his lifetime, made a selection. Indeed, he could not; for at the time of his death, he had no right even to be enrolled as a member of the tribe, which is admitted by all parties to this suit. Therefore, the first condition of the section is not met.

With reference to the second, it appears that at no time has a deed or patent been issued to him for his or her share of the lands. From the record (Pr. Tr., pp. 201 and 211), it appears that, on the 10th day of October, 1904, nearly three years after the death of Andrew J. Berryhill, a patent was issued, not to Andrew J. Berryhill, as Section 22 requires as a condition for the removal of restrictions, but to "the heirs of the said Andrew J. Berryhill." Thus has the second condition prescribed by Section 22 never been met.

Counsel for appellees have laboriously, and by a process of circumlocution, attempted to evade the non-existence of these two absolutely necessary conditions.

The language of the section is plain, and we think not the subject of construction or evasion. We agree fully with the language of the Circuit Court of Appeals for the Eighth Circuit in the case of *Ardmore Coal Co.* v. *Bevil*, 61 Fed., 759, cited by counsel for appellees in their brief, wherein it is said:

"It is generally safe to reject an interpretation

> that does not naturally suggest itself to the mind of the casual reader, but it is rather the result of a laborious effort to extract from the statute a meaning which it does not at first seem to convey."

The mind of the reader of that section would first be impelled by the phrase, "inherited from such decedent," to conclude that that phrase meant just what it says. And this the counsel for appellees tacitly admit by their lengthy, strained argument to show that the phrase does not mean what it says. Likewise would the first impression gathered from a reading of said section be, that the deceased Indian must either have selected his allotment, or that a deed or patent must have been issued to him.

Counsel for appellees attempt to indicate to the court a lack of wisdom on the part of Congress should the statute be determined to mean what it says. The wisdom, or lack of wisdom, indicated by legislation, can never be used to aid in the interpretation of a statute. As said by this Court in *Schuyler County* v. *Thomas*, 98 U. S., 172, Mr. Justice HUNT, speaking for the Court:

> "The after wisdom obtained by unfortunate results cannot justly be applied in an interpretation of the statutes."

See, also,

> *Dewey* v. *U. S.*, 178 U. S., 521;
> *Calderin* v. *Steamship Co.*, 170 U. S., 280;
> *Yerke* v. *U. S.*, 173 U. S., 442;
> *Morton* v. *Nebraska*, 21 U. S., 671;
> *The Cherokee Tobacco Co.*, 11 U. S., 620;
> *Doe* v. *Considine*, 6 U. S., 480;
> *United States* v. *Fisher*, 2 U. S., 386.

In *Hamilton* v. *Rathbone*, 175 U. S., 421, Mr. Justice BROWN, speaking for the court, it is said:

"The cases are so numerous in this court to the effect that the province of construction lies wholly within the domain of ambiguity, that an extended review of them is quite unnecessary, and attempted judicial construction of the language of the statute serves only to create doubt and confuse the judgment."

Counsel for appellees in their brief say, and the Circuit Court for the Eastern District so held, that inasmuch as no good reason exists for the distinction clearly indicated by Section 22 between lands "inherited" and those granted by the government, that no such distinction is made. A similar contention was repudiated by this court in *Bay Refrigerator Co.* v. *Sulzberger*, 157 U. S., 36, where it is said:

"In our judgment the language used is so plain and unambiguous that a refusal to recognize its entirely obvious meaning would be justly regarded as indicating a purpose to change the law by judicial action based upon some supposed policy of Congress. But as declared in *Hadden* v. *Barney*, 72 U. S., 107, what is termed the policy of the government with reference to any particular legislation is generally a very uncertain thing, upon which all sorts of opinions, each variant from the other, may be formed by different persons. It is a ground much too unstable upon which to rest the judgement of the court in the interpretation of the statutes. Where the language of the act is explicit, there is great danger in departing from the words used to give the effect to the law, which may be supposed to have been designated by the legislature. *It is not for the court to say where the language of the statute is clear, that it shall be so construed, because no good reason can be assigned why they were excluded from its provisions.*" Citing

Benn v. *Read*, 35 U. S., 524;
Wilson v. *Rosseau*, 45 U. S., 646;
Blake v. *Bank of New York*, 90 U. S., 307;
United States v. *Kirby*, 74 U. S., 486.

There is, perhaps, no case to be found in the books where the courts have gone further in refusing by judicial construction to supply remedial legislation of defects and omissions in the statutes than is found in a case decided by the United States Supreme Court, entitled *Folsom* v. *United States*, 160 U. S., 21. The facts in this case were that Congress had passed an Act relative to appeals from the Territorial courts, evidently intended to provide that such appeals might be taken to the higher courts of the United States from the courts of the Territories. However, by plain reading of the terms of the Act, it was found it provided that there *might be appeals taken in cases of conviction for misdemeanors, but there could be no writ of error taken to review judgments and proceedings of the Territorial courts in cases of conviction of a felony.* This would seem to be a shocking and glaring absurdity, and would properly appeal to the conscience and judgment of the court to remedy, if it was possible to do so. It was argued to the Supreme Court that Congress could never have intended any such condition as this; that it was one that would immediately strike any person as being not only an absurdity, but as being wholly unjust, and the courts were asked to remedy this by construing the act to mean, what it was apparent to all persons, it was intended to mean. In other words, that the courts should disregard the literal and well understood meaning of the words used, and give to the Act such construction as Congress must evidently have intended them to have. The Supreme Court in passing on this question, used the following language:

> "It is said that this involves the absurdity that conviction for minor offenses are reviewable on the second appeal, while conviction for capital or infamous crimes are not. Doubtless in some cases where the language of the statute leads to an absolute hardship

> or injustice, presumably not intended, a construction may be put upon it modifying the real intention, but where the intent is plain, it is the duty of the court to expound that statute as it stands. So far as Congress went, the language used is unambiguous; the objection really is, that Congress should have gone further and given by this Act a second review of capital or infamous crimes in the Territories; it may be there was an oversight in this particular; but if there be, we certainly cannot supply it by construction."

So in the present case, Congress may have intended that all lands derived by Indian citizens, in any other manner save where they were direct allottees, could be alienable under the Act of April 26th, 1906, but they certainly did not say so, and what is asked of this court by the appellees is for it to say that classes of lands not embraced within a fair and intelligent definition of the words of the Act shall be construed as being covered by the Act, whose language indicates exactly the contrary.

In *Holy Trinity case*, 143 U. S., 457, Mr. Justice BREWER said:

> "No mere omission, no mere failure to provide for contingencies which it may seem wise to have provided for, justify any judicial addition to the language of the statute."

So with the case at bar, regardless of what may appear to have been the wisdom or unwisdom of Congress—whether it would have been better for them to have removed the restrictions on all classes of deceased land; whether it would have been better for them to have removed the restrictions upon inherited lands alone, *as they have done*, or whether it would have been wiser for them not to have removed them at all, it is not within the province of the courts to determine. If Congress omitted, either in-

tentionally or inadvertently, to embrace all classes of deceased lands, then it is the duty of Congress itself to supply the omission, and it is not for litigants to expect courts to remedy these defects in the legislation of Congress.

This exact proposition was recently before the Supreme Court of Oklahoma in the case of *Parkinson* v. *Skelton,* decided March 2nd, 1911. After the decision in this case was rendered, a petition for re-hearing was filed, which is still undisposed of. However, we submit that the opinion of the Oklahoma Supreme Court, insofar as the principles of statutory construction announced are concerned, is absolutely sound. The court there had before it for disposition, this question: "Did the heirs of Indian blood of an enrolled adopted Creek citizen who was not of Indian blood, and who died in 1900, holding a certificate of allotment, duly issued to him for his surplus and homestead allotment, have the power to alienate the lands inherited by them in March, 1905?" It will be remembered that by the provisions of Section 16 of the Supplemental Creek Agreement (32 Stat. L., 500), no lands in the Creek Nation were alienable prior to August 8, 1907, without the approval of the Secretary of the Interior. On April 21, 1904, an Act of Congress was passed, which contained the following provisions removing the restrictions on alienation from certain of the lands of allottees *not of Indian blood:*

> "And all the restrictions upon alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe."

In construing and interpreting this section, the Supreme Court of Oklahoma said:

> "There is no claim made that the deeds in this case had the approval of the Secretary of the Interior, and homesteads are specifically excepted from its operation, leaving solely for our consideration the question of whether this inherited land in the hands of these heirs of Creek blood could be by them alienated.
>
> It is to be first observed that the subject with which Congress was here dealing was one which required at its hands (and which it doubtless had) accurate information of the status of these people and their lands, and a thorough, full and complete knowledge of all previous legislation thereon, *and it is to be presumed that when the valuable and conflicting interests of the people concerned were taken into consideration, that hasty or ill-advised legislation did not follow.* The last Act preceding this one on the subject had been passed approximately two years earlier and its operation had been fully established and its results known, and out of that knowledge and experience came the demand for, and passage of, the Act in question. Nor can we fail to observe with what preciseness and exactness the terms employed are used, with what care and deliberation certain parties and certain lands are included and brought under its operation, and with what conciseness and exactness certain others are excluded. These things are matters which a court, when called upon to pass upon any law, if its meaning is at all doubtful, should carefully consider, and which should have great weight in determining the intention of the maker, *especially when it is sought to extend the operation of the law beyond its plain terms.* It is to be noted that, in the sections of the previous Acts upon which this one bears, which placed the restrictions—that is it therein definitely stated that the lands allotted '* * * shall not be alienable by the allottee or his heirs' (Act of June 30, 1901) and they 'shall not in any manner whatever * * * be alienated by the allot-

> tee or his heirs' (Act of June 30, 1902), and although, as is above seen, there exists the clearest intention to use precise and exact language in the Act removing the restrictions (Act of April 21, 1904), the heirs of the parties are not mentioned and the language used is entirely consistent with an intent not to bring them within its operation. Until the passage of this Act, all must concede the restrictions referred to exist and precluded either the allottee or anyone else from alienating the allotted land, and we cannot but find if it was intended to bring the heirs within the terms or operation of the Act removing the restrictions, they would have been named. *There is too much accuracy and certainty manifest to leave room for an important and far-reaching implication as is here contended.* When this Act was passed, they were no longer the lands of the allottees, but the lands of the heirs of the allottees, and the heirs not being within the language nor, as it appears to us, within the intent of the Act, the restrictions imposed by the previous legislation were not removed."

We submit, therefore, that had Congress intended by Section 22 (above quoted) of the Act of Congress of April 26, 1906, to remove the restrictions on any of the lands other than those *actually* inherited from a deceased Indian, it would by appropriate enactment have said so.

In *Wilson* v. *Morton*, recently decided by the Supreme Court of Oklahoma, and reported in the Pacific Reporter advance sheets of January 1st, 1912 (119 Pac. 213), that court had before it for construction and interpretation Section 22 of the Act of Congress of April 26, 1906, above quoted. In that case, a Cherokee citizen of Indian blood died, leaving both adult and minor Indian heirs. The question presented, was as to whether a conveyance made by the minor heirs should comply with the Oklahoma Statutes regulating the sales of minors' lands, or whether the Act of Congress alone should be followed. The court held that

the Act of Congress alone governed, and, in its opinion, said:

> "Congress, by this statute, intended to and did remove all restrictions upon the alienation of lands *inherited* from deceased Indians of the Five Civilized Tribes in the hands of adult heirs, which had been placed thereon by the various Acts and treaties of Congress with the Indian tribes. It authorized all such adult heirs, except those of full-blood, to sell their *inherited* lands without the approval of anyone; but full-blood adult heirs could convey only with the approval of the Secretary of the Interior. * * * If Congress intended that the statutes in force in the Indian Territory at the time of the passage of this act should fix the procedure to be followed in making such sales at the passage of the Act, it may be assumed that Congress knew what such statutes were, and, if the procedure prescribed by the statutes would in a large measure defeat the legislative purpose in permitting minor heirs to join the adult heirs in the sale, the Act ought not to be held by mere implication to provide that such sales should be governed by those statutes. In placing restrictions upon the alienation by Indian allottees of the Five Civilized Tribes of their allotted lands, the legislative purpose was to protect the Indian against his own improvidence, against the cunning of those who, through cupidity, might undertake to procure from them their lands at inadequate prices, and to protect them against the superior business ability of his more experienced white neighbors until such Indians might become familiar with their lands and their value, and sufficiently adapted to the new condition in which they were placed by a division of their tribal property that they could realize the full value of their lands when the same were placed upon the market by them. In authorizing the adult heirs to sell their inherited lands, Congress correctly anticipated that many cases would arise in which there would be both adult and minor heirs, each holding an

> undivided interest in the lands of a deceased allottee; and, unless some provision was made for the minor heirs to join with the adult heirs in the sale of the entire property, the very property which the Act authorizes the adults to sell would be attended with conditions that would greatly tend to prevent those Indians whom the government had theretofore kept under its protecting care from securing the market value of their interest in their inherited estates. * * * *The language of Section 22 here under consideration, can be said to be slightly ambiguous, if ambiguous at all.* There can be no doubt as to what Indian minors may, under its provisions, sell their *inherited* lands, or when they can sell. As to how the sale shall be made, the Act provides that it shall be by the guardian, duly appointed, upon order of the court, and that the order of court shall be made upon petition filed by the guardian. The procedure prescribed by the Act itself seems to us complete. There is no express intent to incorporate the provisions of any other statute into this one, or to make any other statute applicable to sales thereunder; and we think it should not be construed as accomplishing this result, when to do so would lead to confusion and to a practical, if not complete, defeat of the purposes of the Act."

The court then expressly finds that the section is not ambiguous, and that there is no necessity of going outside the express provisions of the section to ascertain the intention of Congress.

The Circuit Court for the Eastern District of Oklahoma, in its opinion in the case at bar (Pr. Tr., 270), says:

> "I can conceive no reason why any distinction should be made between the two classes of lands referred to;"

meaning thereby "lands allotted to heirs," and "lands inherited by heirs." Yet, in a decision rendered by the same court on December 22, 1911, in the case of *Gracie*

Hawkins, et al., v. *Okla. Oil Co., et al.* (not yet reported), the court does make make this very distinction. In that case, the lands, as in the case at bar, were allotted to the heirs of a deceased citizen, and were *not inherited* by the heirs. The contention was there made by the plaintiff that no distinction should be made between the two classes of lands; that in case of an allotment to a living citizen, there should be under the provisions of the Supplemental Creek Agreement a surplus allotment of one hundred twenty acres and a homestead allotment of forty acres; that separate patents should issue for each; and that where the allotment was made to the heirs, no distinction should be made, and that the patents should issue in the same manner to the heirs as if the citizen were living. The court, in its decision, held that a distinction should be made between "allotments made directly to the heirs," and "allotments which were inherited by heirs," that where the patents were issued directly to the heirs of deceased citizens not of Indian blood, none of the lands should be considered to be a homestead, and that it all should be held as a surplus allotment under the provisions of the Act of April 21, 1904, above quoted, which removed the restrictions upon alienation from certain lands of citizens not of Indian blood. We have printed in the appendix to this brief the opinion of the Circuit Court for the Eastern District of Oklahoma in the *Hawkins-Okla. Oil Company* case.

In conclusion, we desire only to call the attention of the court to the decision of the Supreme Court of Oklahoma in the case of *Sanders* v. *Sanders*, 117 Pac., 338, cited by counsel for appellees in their brief at page 78. Statement is made by appellees that this case decided that the restrictions on alienation were removed from mixed blood Indian heirs by Section 22 of the Act of Congress of April 26, 1906, without regard to whether the allotment was

made to the deceased citizen in his lifetime, or to his heirs after death. This is, to some extent, true. The deceased citizen in the *Sanders* case died before allotment, leaving surviving her several children and her husband. The court there held that they would not recognize a distinction between allotments "inherited by heirs," and allotments "made directly to the heirs," yet, in the concluding paragraph of the court's opinion, it does make this very distinction, by holding that the surviving husband was not entitled to an estate by curtesy in the lands of his deceased wife, for the reason that the deceased Indian, his wife, "died seized of no estate of inheritance." The foregoing case, we believe, demonstrates not only the inadvisability, but also the impossibility of accepting the contention of appellees, made to the effect that no distinction should be made in the construction of the above quoted Section 22 of the Act of Congress of April 26, 1906, between heirs taking lands in the Creek Nation in their own right by purchase; and heirs taking lands by inheritance from the ancestors.

Respectfully submitted,

C. L. Thomas,
Edgar A. de Meules,
Solicitors for Appellant,
Albert W. Shulthis.

APPENDIX

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF OKLAHOMA.

Gracie Hawkins and M. C. Perry, Guardian of Gracie Hawkins, Plaintiffs, vs. The Okla Oil Company, et al., Defendants.—No. 1121.

CAMPBELL, D. J.:

This cause is a suit by the plaintiff as guardian of Gracie Hawkins, a minor, for the recovery of damages from the defendants for the alleged unauthorized taking of oil from a certain tract of land, in which it is alleged the said minor has an interest. The case was tried to the court, jury having been formally waived. Pursuant to ruling made at the trial, the only question now for consideration is whether or not the heirs of one Elijah Corbray, deceased, in whose name the land was originally selected (he having died in May, 1899, intestate, and before selection), had capacity after April 21, 1904, to alienate that part of the allotment set apart, allotted, and patented to the said heirs as a homestead.

The deceased and the heirs were all Creek freedmen. The land was allotted to the heirs in 1901, in two separate tracts, one as homestead and the other as surplus, and, in 1904, patents were issued to the heirs, one for the surplus and one for the so-called homestead tract.

If, under the circumstances of this case, there was no authority of law for allotting a separate homestead portion, and the entire allotment should have passed, and, in

legal effect, did pass to the heirs with the status of surplus rather than homestead land, then by the Act of April 21, 1904 (33 Stat., 189), it was relieved of all restrictions, not only as to that designated surplus, but also as to that designated homestead.

It was the custom of the Commission to the Five Civilized Tribes in making these allotments, to designate a certain 40 acres out of each allotment as a homestead, and to have patents issued accordingly, whether the allotment was selected during the lifetime of the member in whose name it was made, or whether it was not selected until after his death, in which case the allotment was made to the heirs. As this land was allotted in 1901, the provisions of law under which it was allotted are found in the Original Creek Agreement (31 Stat. 861). The first section of this agreement defines several of the terms used. The second section provides for appraisement of the land as a basis for classification for the purpose of allotment. The third section provides that the land shall be allotted among the citizens of the tribe so as to give each an equal share of the whole in value, as nearly as may be, and in order to accomplish this, it was provided that there should be allotted to each citizen 160 acres, so selected by him as to include his improvements, if any. Section 4 provided that the allotment for a minor might be selected by his father, mother, or guardian, and those for prisoners, convicts, aged and infirm persons, by their duly appointed agents; and if incompetents, by guardians, curators, or suitable persons akin to them. Section 5 has relation to the disposition of improvements any citizen may have on lands in excess of his allotment. Section 6 confirms allotments made prior to the agreement, and authorizes the Commission to determine controversies arising between citizens as to their right to select certain tracts of land. Section 7 provides:

"Lands allotted to citizens hereunder, shall not

in any manner whatsoever or at any time be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the date of the deed to the allottee therefor, and such lands shall not be alienable by the allottee or his heirs at any time before the expiration of five years from the ratification of this agreement, except with the approval of the Secretary of the Interior.

Each citizen shall select from his allotment forty acres of land as a homestead, which shall be non-taxable and inalienable and free from any incumbrance whatever for twenty-one years, for which he shall have a separate deed, conditioned as above: *Provided*, That selections of homesteads for minors, prisoners, convicts, incompetents and aged and infirm persons, who cannot select for themselves, may be made in the manner herein provided for the selection of their allotments; and if, for any reason, such selection be not made for any citizen, it shall be the duty of said Commission to make selection for him.

The homestead of each citizen shall remain, after the death of the allottee, for the use and support of children born to him after the ratification of this agreement, but if he have no such issue, then he may dispose of his homestead by will, free from limitation herein imposed, and if this be not done, the land will descend to his heirs, according to the laws of descent and distribution of the Creek Nation, free from such limitation."

The first paragraph of this section, it appears, places a general restriction against alienation for a term of five years upon all the lands allotted to citizens under this agreement, except with the approval of the Secretary of the Interior. The second paragraph provides that each citizen shall select from *his* allotment a homestead of forty acres, which shall be non-taxable, inalienable, and free from incumbrance for twenty-one years, and for which a separate patent shall issue. In case the allottee be a minor,

convict, incompetent, or aged and infirm person, and therefore unable to select his own homestead, selection may be made in the manner provided in Section 4 for the selection of allotments, and in case such selection be not made for any citizen, it becomes the duty of the Commission to make selection for him. The third paragraph provides for the disposition of the homestead upon the death of the allottee.

It is clear that up to this point, the scheme of allotment provided contemplates that the several members of the tribe shall be alive and in being at the time the division of the lands provided for comes to be actually made. It contemplates in such instance but one allottee—not several—for each separate allotment. Up to this point, it is referred to as *his* allotment; "each citizen shall select from *his* allotment forty acres of land as a homestead, * * * for which *he* shall have a separate deed. * * * The homestead of *each* citizen shall remain, after the death of the *allottee*, for the use of children born to *him* * * * etc. But if there be no such children, then *he* may dispose of *his* homestead by will, and if this be not done, the land shall descend to *his* heirs, etc." It is clear that this homestead provision contemplates a living member of the tribe, who is taking his allotment and for whose protection against his own profligacy or lack of business experience or ability in the face of the conditions surrounding him, the homestead portion is secured to him for twenty-one years, or for such less time as he may continue to live. Section 8 of the agreement provides how the allottee shall be placed in the possession of his allotment, and Section 9 provides for the disposition of the residue of the lands after completion of the allotments, etc. Sections 10 to 22, inclusive, have reference to townsites. Section 23 provides for the issuance of patent to each individual allottee covering his al-

lotment. Subsequent sections, up to 28, have reference to matters foreign to this inquiry. Section 28 provides:

> "No person, except as herein provided, shall be added to the rolls of citizenship of said tribe after the date of this agreement, and no person whomsoever shall be added to said rolls after the ratification of this agreement.
>
> All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under Section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, 'An Act for the protection of the people of the Indian Territory, and for other purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of the Creek Nation, and be allotted and distributed to them accordingly.
>
> All children born to citizens so entitled to enrollment, up to and including the first day of April, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if such child die after said date, the lands and moneys to which it would be entitled, if living, shall descend to its heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.
>
> The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other persons."

It will be remembered that Section 3 provided for the allotment of the lands among the *citizens* of the tribe. Sec-

tion 28, *supra*, provides who shall be enrolled as citizens and makes such roll, when completed and approved, the basis for the distribution of the tribal lands and money. But, as it was apparent that, under the circumstances, a considerable time must elapse in completing the roll, and more or less time must elapse after the enrollment of a member before he could make a selection of an allotment, it followed that in the nature of things some of them might die in the interim. A certain date was therefore established at which the right of a member then living, to enrollment and allotment, became fixed. If, after that time, and before enrollment, any member should die, this did not affect the roll, but his name was to be placed thereon, just as if living, and the roll being the basis of allotment, there must be an allotment for every name on the roll. But an allotment could not pass to a person not in being, so that some other disposition must be made of the allotment for each enrolled member dying before selection. That contingency is covered by the provision that in such case the allotments shall descend to the heirs according to the laws of descent and distribution of the Creek Nation, and be allotted, and distributed to them accordingly. In such case, of course, the one allotment of 160 acres vests jointly in its undivided entirety in as many different persons as there are heirs to take. No provision is made in such case for their joint selection out of the tract of a forty-acre homestead, and the lack of reason for and the very absurdity of such a provision is manifest from the very statement of the proposition.

The practice of the Commission, therefore, in dividing the allotment in such instances into separate tracts, designating one the homestead and the other the surplus, is, in my judgment, without reason or authority, and the fact that it did so does not change the essential status of the

land, which must be considered the same as the surplus portion of individual allotments made to living members. The Act of April 21, 1904, therefore, removed the restrictions from the land involved in this case, and judgment must be rendered for the defendant.

(Signed) RALPH E. CAMPBELL.

Office Supreme Court, U. S.
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(21900 and 21901.)

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1911.

ALBERT W. SHULTHIS, *Appellant,*
vs.
D. A. McDOUGAL et al., *Appellees.* } No. 156.

GEORGE FRANKLIN BERRYHILL, *Appellant,*
vs.
ALBERT W. SHULTHIS et al., *Appellees.* } No. 157.

REPLY BRIEF OF GEORGE FRANKLIN BERRYHILL,

Appellant No. 157.

JAMES P. HARROLD,
SOLICITOR FOR GEORGE FRANKLIN BERRYHILL.

BARNARD & MILLER PRINT CHICAGO

IN THE

Supreme Court of the United States,

OCTOBER TERM, A. D. 1911.

ALBERT W. SHULTHIS, *Appellant,* vs. D. A. McDOUGAL et al., *Appellees.*	No. 156.
GEORGE FRANKLIN BERRYHILL, *Appellant.* vs. ALBERT W. SHULTHIS et al., *Appellees.*	No. 157.

REPLY BRIEF OF GEORGE FRANKLIN BERRYHILL, Appellant No. 157.

By way of reply to the arguments of the appellees, the intervenor, George Franklin Berryhill, asks the attention of the court to a further brief discussion of some of the points involved.

As his fourth specification of error this intervener submitted the following proposition:

"IV.

"The lands in controversy under the provisions of the Supplemental Creek Agreement were held by George Franklin Berryhill as

though they had been conveyed to him by name, and were not an estate of inheritance. Hence the deed to Edmond and Perry McKay of June 5, 1906, was wholly void under the restrictions upon alienation fixed in said agreement for five years after August 8, 1902."

This proposition seemed so clear that counsel for the intervenor did not feel the necessity of presenting argument upon it at much length. It depends upon the interpretation and construction of Section 16 of the Supplemental Creek Agreement and Section 22 of the act of Congress of April 26, 1906. These are quoted at pages 50 and 51 of this intervener's original brief.

The Supplemental Creek Agreement admittedly restrained the right of alienation of the lands of all allottees and their heirs for a period that had not expired on June 5, 1906. Clearly the whole question is, did the act of April 26, 1906, remove this restriction and give George Franklin Berryhill the right to make a conveyance of this property?

In any discussion of such a proposition it is necessary to keep in mind the general policy of the government in making individual allotment of Indian lands. That policy has been invariably to protect the Indian against the avariciousness of those of the white race who would take advantage of their superior education and financial position to acquire the Indians' patrimony at a sacrificial price. It has always been the expressed purpose of the national government to protect the Indian and guard against his being cheated and overreached by his white

brother. This policy is clearly apparent in all of the dealings with the "Five Civilized Tribes" and the Creek Nation. Is there anything in the act of 1906 that will indicate the purpose of the government to depart from this general policy? Clearly not; and in the only case in this court where this act is construed the court has taken pains to reiterate this proposition and resolve any uncertainty in language in favor of the general policy of restriction.

Tiger v. *Western Inv. Co.*, 221 U. S. 286.

A careful reading of Section 22 of this act will show the recognition of two distinct classes of Indians. First, those to whom allotments have been made by the government and the Creek Nation, and, Second, those to whom allotments have not been made but who have acquired interests by inheritance from an original owner. Section 16 of the Supplemental Creek Agreement, by its terms, recognizes this classification when it prohibits alienation or encumbrance by an allottee *or his heirs.* Section 22 of the act of April 26, 1906, is amendatory of Section 16 and should be read and construed, in so far as possible, as though the two sections were one piece of legislation, and the latter should be construed as not changing the former to any greater extent than the intention to change clearly and unmistakably appears.

> "An amendatory act and the act amended are to be construed as one statute, and no portion of either is to be held inoperative if it can be sustained without wresting words from their appropriate meaning."
>
> Lewis' Sutherland Stat. Const., Sec. 448, and cases cited.

Keeping these general observations in mind, let us examine these sections carefully. The two classes of Indians (1) those to whom allotments have been made, and (2) the heirs of those to whom allotments have been made, are recognized in both sections. In the Supplemental Creek Agreement both these classes are denied the right of alienation. In the act of 1906, without any general change of policy, the right of alienation is given to the second class.

An examination of the exact words of this amendatory section would seem to show clearly its inapplicability to the case of this intervenor.

> "That the adult heirs of any deceased Indian of either of the Five Civilized Tribes, *whose selection has been made,* or *to whom* a *deed or patent has been issued* for his or her share of the lands of the tribe to which he or she belongs or belonged, may sell and convey the lands inherited from such decedent * * * etc."

Recalling the facts, the court will remember that the deceased child, Andrew J. Berryhill, died before any allotment was made in his name and, in fact, before the enactment of the legislation which made it possible to place his name upon the rolls of citizenship of the Creek Nation. It is impossible to conceive that any court could so distort this statute by interpretation as to hold that Andrew J. Berryhill was a "*deceased Indian whose selection has been made, or to whom a deed or patent has been issued.*"

It must not be forgotten that the restrictions upon alienation of the lands of the Creek Nation were not

irksome requirements designed to limit the rights of Creek citizens, but were conceived as measures of protection to the property rights of the members of an expiring dynasty until they should be able to fully realize the new order and meet upon terms of business equality with the experienced members of the white race.

Counsel for the appellees argue at great length and with much reiteration that the interpretation of Section 22 contended for by this intervenor is unreasonable and absurd. Just why it is so does not appear clearly from a reading of their brief, unless, indeed, they feel that they should be heard for their much speaking. Counsel say in their brief that "strictly and legally construed this section might be interpreted to limit the removal of restrictions to that particular class of heirs taking lands by descent technically speaking." Now, why is it not most reasonable to give this section this strict and legal construction? A study of the treaties and acts of Congress affecting the Creek Nation will show the unmistakable general policy to conserve the property of the Indians by means of a system of restriction upon alienation. This is the method adopted from the time of the earliest individual allotments to prevent the Indian from squandering his patrimony. The books are full of authorities to the effect that departures made by the legislature from such general policies will be strictly construed. General words are not to be so construed as to alter the previous policy of the law, unless no sense or meaning can be put upon them consistent with the intent of preserving the existing policy untouched.

Equivocal words will not be accepted as implying an intent to depart from a settled statutory policy, and general language will be restricted to bring the act into harmony with it.

Greenhow v. *James,* 80 Va. 636.
Atty. Genl. v. *Smith,* 31 Mich. 359.
Baxter v. *Tripp,* 12 R. I. 310.
Grenada Co. v. *Brogden,* 112 U. S. 261.
Fort v. *Burch,* 6 Barb. 60.
Minet v. *Leman,* 20 Beav. 269.

Counsel make the gratuitous statement that "Hundreds and hundreds of thousands of dollars" have been invested in the lands of the Creek Nation upon the theory that the courts would construe Section 22 of the act of April 26, 1906, as removing all restrictions from the lands of mixed blood Indians; whether this be true or not I do not know, and I submit that there is nothing in the record of this case upon which to base the statement, but if we assume that the statement be true and that it may be used as an argument, what of it? Will this court be greatly moved by the possible financial loss that may befall those who rushed to take advantage of the supposed removal of a restriction that was representative of a fixed policy of the United States Government to protect its Indian wards, and will this court hasten to adopt a construction of this statute that will conserve these "investments," even though that construction works damage and hardship to the Indians?

No court has passed directly upon the question we

are discussing. Counsel make the statement that the Supreme Court of Oklahoma in *Sanders* v. *Sanders,* 117 Pac. Rep. 338, decided that this section removed the restrictions from mixed blood heirs, but a careful reading of that case will show a clear distinction between it and the case at bar. In that case the deceased Sarah E. Sanders filed on the land in controversy and died in possession thereof, so that it might be said that she had done all she could to secure her allotment; further, the court does go on and recognize the very distinction by holding that the surviving husband was not entitled to an estate by curtesy in the lands of his deceased wife, for the reason that the deceased Indian, his wife, "died seized of no estate of inheritance." And in a later case decided in the United States Circuit Court sitting in the Eastern District of Oklahoma (*Gracie Hawkins et al.* v. *Okla. Oil Co. et al.,* not yet reported), the court clearly recognized the distinction between "allotments made directly to the heirs" and "allotments which were inherited by heirs." A copy of this opinion is printed as an appendix to the reply brief of the original complainant on file in this case.

The Supreme Court of the United States reversed the Supreme Court of Oklahoma in a recent case involving a construction of certain portions of Section 22 of the act of April 26, 1906, and in doing so indicated again that this court does not intend to depart from its traditional policy of favoring the Indians in the construction of laws and treaties affecting their relations with the whites, and the court gives to the act the construction most favora-

ble to the rights of the Indian litigant, even though such a construction might very well not have prevailed in case the legislation had been applicable only to white citizens.

Tiger v. *Western Inv. Co.*, 221 U. S. 286.

This rule of construction is neither new nor unique. From the earliest times the courts have laid down a rule of construction favorable to the Indians.

> "The doctrine is familiar that the language of a statute is to be interpreted in the light of the particular matter in hand and the object sought to be accomplished as manifested by the other parts of the act. * * *"

And further on the court refers to

> "the settled rule of construction that as between the whites and the Indians the laws are to be construed most favorably to the latter."
>
> Cherokee Intermarriage Cases, 203 U. S. 76.

> "By a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians. And the rule should certainly be applied to determine between two inferences one of which would support the purpose of the agreement and the other impair or defeat it. On account of their relations to the government it can not be supposed that the Indians were alert to exclude by formal words every inference which might militate against or defeat the declared purpose of themselves and the government, even though it could be supposed that they had the intelligence to foresee the 'double sense' which might some time be urged against them."
>
> *Winters* v. *United States*, 207 U. S. 564.

The rule that treaties with Indian tribes and legislation regarding the Indians will be liberally construed in their favor is well recognized and supported by an unbroken line of authority:

Worcester v. *Georgia*, 6 Pet. 515.

Kansas Indians, 5 Wall. 737.

Wau-pe-man-qua v. *Aldrich*, 28 Fed. Rep. 489.

Navarre v. *U. S.*, 33 Ct. of Cl. 235.

Allen County v. *Simons*, 129 Ind. 193.

Missouri River, etc., Co. v. *Morris*, 13 Kan. 302.

Choctaw Nation v. *U. S.*, 119 U. S. 1.

United States v. *Kagama*, 118 U. S. 375.

Goodfellow v. *Muckey*, 10 Fed. Cas., No. 5537.

Counsel for appellees seem to regard it as a matter worthy of bitter complaint that the intervenor has retained counsel from the City of Chicago to represent him in this court. Such feeling is of no interest to this court, and I should not refer to it at all except that I can not resist the temptation to remark that it is probably true that the interest of some members of the bar of Oklahoma is very likely to be unconsciously biased in favor of their clients who have invested "Hundreds of thousands of dollars" in the construction of a statute before it has been passed upon by the courts, and who dread the effect of a decision in a tribunal far removed from the local conditions and prejudices.

Counsel also complain that no offer is made by this intervenor to return the consideration for his deed of June 5, 1906, evidently forgetting the words of the statute upon which intervenor relies:

> "Any agreement or conveyance of any kind violative of any of the provisions of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

It has been universally hold by the courts that the restrictions upon alienation placed upon Indian lands allotted in severalty are of such nature that conveyances made in contravention of them are wholly void.

Smith v. *Stevens*, 10 Wall. 321.
Swope v. *Purdy*, 1 Dill. 349.
Smythe v. *Henry*, 41 Fed. Rep. 705.
Briggs v. *Sample*, 43 Fed. Rep. 102.
Eells v. *Ross*, 64 Fed. Rep. 417.
Laughton v. *Nadeau*, 75 Fed. Rep. 789.
Libby v. *Clark*, 118 U. S. 250.
Wiggan v. *Connolly*, 163 U. S. 56.
Love v. *Pamplin*, 21 Fed. Rep. 755.
Stevens v. *Elliott*, 118 Pac. Rep. (Okla.) 407.

Counsel have cited a number of cases upholding the doctrine that a statute is to be construed as a part and parcel of the whole uniform system of the laws on the subject, and in this elementary proposition the intervenor must concur. But what is the application to the case at bar? The policy of the United States toward the Indian tribes, as exemplified by the treaties with the Creek Indians and the legislation affecting the members of that tribe, was developed along definite and well defined lines. First, the United States dealt with the tribe as a political entity and the earlier treaties resemble very

closely the dealings with independent political states; Second, the legislation developed toward the recognition of the individual Indian and to a regulation of his rights and duties toward the other members of his tribe; Third, the gradual elimination of the tribal relations and step by step the individualization of their property rights and their recognition as citizens of the United States. Throughout all of these steps ran the recognition by Congress that these people were wards of the Government and that their interests must be protected against commercial exploitation on the part of the whites. When the time arrived to begin the individual allotment of the tribal lands, it was found necessary in the carrying out of this general paternal policy to limit the right of alienation. This was not done in sporadic instances, but as part of a broad general policy; it was not a hardship imposed upon the Indian allottee, but a wise provision to protect him in the enjoyment of his property and to encourage his desire to develop a home and become a useful individual member of society. This general policy was never reversed, but as the years went by the restraints were gradually removed from time to time.

Apply this doctrine to the section we are discussing and it will be seen that the technical and legal meaning of the words is the very meaning that best fits the general policy of Congress in its dealings with the Indian tribes. Why, then, seek a more "reasonable" construction, especially when to do so requires a straining of the language and the giving of an unnatural significance to well defined terms?

It has been decided that the Act of 1901, making citizens of the Five Tribes citizens of the United States, does not take away the right of Congress to protect the Indians as wards of the Nation.

> "The privileges and immunities of federal citizenship have never been held to prevent governmental authority from placing such restraints upon the conduct or property of citizens as is necessary for the general good. Incompetent persons, though citizens, may not have the full right to control their persons and property."
>
> *Tiger* v. *Western Ins. Co.*, 221 U. S. 286.

> "Bearing in mind the rule that the legislation of Congress is to be construed in the interest of the Indian, it may fairly be held that the statute does not contemplate a surrender of jurisdiction over an offense committed by one Indian upon the person of another Indian within the limits of a reservation; at any rate, it cannot be said to be clear that Congress intended by the mere grant of citizenship to renounce entirely its jurisdiction over the individual members of this dependent race."
>
> *U. S.* v. *Celestine*, 215 U. S.
>
> *Eells* v. *Ross*, 64 Fed. Rep. 417.

Again quoting from the Tiger case:

> "Conceding that Marchie Tiger, by the act conferring citizenship, obtained a status which gave him certain civil and political rights, inhering in the privileges and immunities of such citizenship unnecessary to here discuss, he was still a ward of the Nation so far as the alienation of these lands was concerned, and a member of the Creek Nation."
>
> *Tiger* v. *Western Inv. Co.*, 221 U. S. 286.

Counsel for the intervenor wishes also to call the court's particular attention to two recent cases in the Supreme Court of Oklahoma, from which counsel for the original complainant have quoted quite fully in their reply brief on file in this case. These are *Parkinson* v. *Skelton*, decided March 2, 1911, and still unreported, and *Wilson* v. *Morton*, 119 Pac. Rep. 213. I quote a short portion of the opinion in *Wilson* v. *Morton*, which again reiterates the reason for the policy of restriction and shows the underlying principle to be followed in the construction of statutes defining the relations between the Indians and their white neighbors:

> "In placing restrictions upon the alienation by Indian allottees of the Five Civilized Tribes of their allotted lands, the legislative purpose was to protect the Indian against his own improvidence, against the cunning of those who, through cupidity, might undertake to procure from them their lands at inadequate prices, and to protect them against the superior business ability of his more experienced white neighbors until such Indians might become familiar with their lands and their value, and sufficiently adapted to the new condition in which they were placed by a division of their tribal property that they could realize the full value of their lands when the same were placed upon the market by them."
>
> *Wilson* v. *Morton*, 119 Pac. Rep. 213.

I quote again the recitals of the deed conveying the title to the premises in question to this intervenor, George Franklin Berryhill, executed by P. Porter, principal chief of the Muskogee (Creek) Nation, on October 10, 1904, and approved by Ethan Allen Hitchcock, Secretary of the Interior, on October 31, 1904 (Rec., 212, 213):

"Whereas, the Commission to the Five Civilized Tribes has found that Andrew J. Berryhill, a citizen of said tribe, is now dead, and said Commission has certified that the land hereinafter described has been allotted to the heirs of the said Andrew J. Berryhill;

Now, therefore, I, the undersigned, the Principal Chief of the Muskogee (Creek) Nation, by virtue of the power and authority vested in me by the aforesaid Act of Congress of the United States, have granted and conveyed, and by these presents do grant and convey, unto the said heirs of Andrew J. Berryhill, deceased, all right, title and interest of the Muskogee (Creek) Nation, etc. * * *"

Now, bear in mind that at the time of the allotment of this land and of its conveyance the child, Andrew J. Berryhill, had been dead for nearly three years. The Supplemental Creek Agreement, under the terms of which this allotment must have been made, was passed June 30, 1902, and became effective on August 8, 1902. Andrew J. Berryhill was born on the 6th day of May, 1901, and died in November, 1901. By what sophistry would it be possible to regard this child as a "deceased Indian of either of the Five Civilized Tribes, whose selection has been made, or to whom a deed or patent has been issued * * *"?

The selection was made, as appears by the recital in the deed, and allotted to the "heirs of the said Andrew J. Berryhill" (George Franklin Berryhill); and the deed or patent has been issued to the "said heirs of Andrew J. Berryhill" (George Franklin Berryhill). George Franklin Berryhill therefore became seized of these lands as one to whom an original allotment had been made, and not through in-

heritance from an ancestor as an act of law. This being true, he was still protected by the restriction upon alienation provided by the terms of the Supplemental Creek Agreement. He is one for whom a selection has been made or a deed or patent issued, and not the heir of such a one.

This intervenor submits that the court should declare the deed of June 5, 1906, conveying these premises to Edmond McKay and Perry McKay, void and of no force and effect, and should direct a decree finding the title to said premises in this intervenor.

Respectfully submitted.

JAMES P. HARROLD,
Solicitor for George Franklin Berryhill.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

Office Supreme Court, U. S.
FILED.
JAN 18 1912
JAMES H. McKENNEY,
CLERK.

No. 156.

ALBERT W. SHULTHIS, APPELLANT,

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, THE KIEFER OIL & GAS COMPANY, AND GEORGE FRANKLIN BERRYHILL, APPELLEES.

No. 157.

GEORGE FRANKLIN BERRYHILL, APPELLANT,

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, AND KIEFER OIL & GAS COMPANY, APPELLEES.

APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF AND ARGUMENT FOR APPELLEES.

PRESTON C. WEST,
GEO. S. RAMSEY,
Counsel for Appellees.

(21,900 and 21,901)

SUPREME COURT OF THE UNITED STATES.

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APPEALS FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

SUPPLEMENTAL BRIEF FOR APPELLEES.

May it please the Court:

Opposing counsel claim that the proviso to section 20 of the act of Congress approved April 26, 1906, wherein it is provided "that all leases en-

tered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory," is a legislative construction and legislative declaration that prior thereto leases were not in the purview of the recording act. We pointed out in our brief in chief that section 20 was largely declaratory of the existing law. Counsel contend that leases made by allottees were not subject to the recording laws.

By section 17 of the supplemental Creek Agreement ratified by act of Congress approved June 30, 1902 (Statutes at Large, 500), Creek citizens were empowered to lease their allotments for agricultural purposes without approval of the Secretary of the Interior for not exceeding five years. Likewise the Cherokee allottees, under section 72 of the Cherokee Agreement ratified by act of Congress approved July 1, 1902 (32 Statutes at Large, 716), were authorized to lease their allotments for as much as five years for agricultural purposes without the approval of the Secretary. Seminole allottees, under the Seminole Treaty ratified by act of Congress approved July 1, 1898, were authorized to lease their allotments for not exceeding six years, the lease to be approved by the principal chief and a copy filed in the office of the clerk of the United States Court at Wewoka.

At the time Congress put in force the Arkansas recording laws, by act approved February 19, 1903, none of the allotted lands of the Five Civilized

Tribes were alienable, yet it must be admitted that all leases made by Cherokee and Creek allottees under the provisions giving them power to lease for not over five years were eligible to registration and fell within the recording laws. So it cannot be said that the proviso in section 20 of the act approved April 26, 1906, in any sense raises an inference that leases made by allottees prior thereto were not subject to the recording laws. The second paragraph of the act of Congress putting in force the Arkansas recording laws is as follows:

> "It shall be the duty of each clerk or deputy clerk of such court to record in the books provided for his office all deeds, mortgages, deeds of trust, bonds, leases, covenants, defeasances, bills of sale, *and other instruments of writing* of or concerning lands, tenements, goods, or chattels; and where such instruments are for a period of time limited on the face of the instrument they shall be *filed and indexed*, if desired by the holder thereof, *and such filing for the period of twelve months* from the filing thereof shall have the same effect in law as if recorded at length. The fees for filing, indexing, and cross-indexing such instruments shall be twenty-five cents, and for recording shall be as set forth in section thirty-two hundred and forty-three of Mansfield's Digest of eighteen hundred and eighty-four."

Under the above paragraph "instruments for a period of time limited on the face of the instru-

ment" could be filed and indexed instead of recorded at length on the books and such filing would constitute constructive notice. We insist that the proviso of section 20 of the act of April 26, 1906, providing "that all leases entered into for a period of more than one year shall be recorded in conformity to the law applicable to recording instruments now in force in said Indian Territory," was referable to and amendatory of the above-quoted paragraph of the act of February 19, 1903, putting in force the Arkansas recording laws.

Congress, by act approved April 21, 1904 (33d Statutes at Large, 189), authorized the Secretary of the Interior to consent to the alienation of the lands of any allottee, except the homestead and except minors. That part of the act pertinent is as follows:

> "And all the restrictions upon the alienation of lands of all allottees of either of the Five Civilized Tribes of Indians who are not of Indian blood, except minors, are, except as to homesteads, hereby removed, and all restrictions upon the alienation of all other allottees of said tribes, except minors, and except as to homesteads, may, with the approval of the Secretary of the Interior, be removed under such rules and regulations as the Secretary of the Interior may prescribe, upon application to the United States Indian agent at the Union Agency in charge of the Five Civilized Tribes, if said agent is satisfied upon a full investigation of each individual case that such removal of restrictions is for the best interest of said al-

lottee. The finding of the United States Indian agent and the approval of the Secretary of the Interior shall be in writing and shall be recorded in the same manner as patents for lands are recorded."

Under the above-quoted act all the lands (except homesteads) of allottees of the Five Tribes were alienable immediately, part with the consent of the Secretary and the balance without the consent of the Secretary. Under the decision of this court in Lomax *vs.* Pickering, all deeds of conveyance made by allottees of any of the tribes requiring the consent of the Secretary were eligible to registration and subject to the recording laws; and also departmental leases.

Most respectfully submitted,

PRESTON C. WEST,
GEO. S. RAMSEY,
Counsel for Appellees.

In the

SUPREME COURT *of the* UNITED STATES

October Term, 1911.

No. 156.

ALBERT W. SHULTHIS, *Appellant,*

vs.

D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY, *The* KIEFER OIL & GAS COMPANY *and* GEORGE FRANKLIN BERRYHILL, *Appellees.*

No. 157.

GEORGE FRANKLIN BERRYHILL, *Appellant,*

vs.

ALBERT W. SHULTHIS, D. A. McDOUGAL, EDMOND McKAY, PERRY McKAY *and The* KIEFER OIL & GAS COMPANY, *Appellees.*

May It Please the Court:

The question to be determined upon a consideration of the jurisdiction of this Court is whether or not this suit is one "arising under the Constitution or Laws of the United States," and that question is to be determined by the application of the test first laid down by Chief Justice MARSHALL in the cases of *Cohens* v. *Virginia*, 6 Wheat. 265; 5 L. Ed.

257, and *Osborn* v. *Bank of United States,* 9 Wheat, 739; 6 L. Ed., 204; and from that time to the present day reiterated by this Court:

> May the title or right set up by the party be defeated by one construction of the Constitution or law of the United States or sustained by the opposite construction?

Or, as more recently stated by this Court in the case of *Bankers Mutual Casualty Company* v. *Minneapolis, etc., Co.,* 192 U. S., 372; 48 L. Ed., 484:

> Did the party seeking the jurisdiction of this Court "assert a right which might be defeated or sustained by one or another construction of the Constitution or of any law of the United States?"

See, also, *Patton* v. *Brady,* 184 U. S. 609; 46 L. Ed. 713. Whether or not such a right has been asserted must appear by *a statement of facts* in legal and logical form, such as is required by good pleading, from the plaintiff's statement of his own claim.

Devine v. *Los Angeles,* 202 U. S., 313; 50 L. Ed. 1046;
Bankers Mutual Casualty Co. v. *Minneapolis, etc., Co.,* 192 U. S., 372; 48 L. Ed., 484;
Joy v. *St. Louis,* 201 U. S., 332; 50 L. Ed., 776.

It becomes necessary, then, to take the statement of facts as contained in the bill and to ascertain whether or not the right or title therein asserted may be defeated by one construction of the laws of the United States, or sustained by another.

At the outset, we may eliminate any question arising fro mthe absence in the bill of the bare statement that "this is a suit arising under the laws of the United States," or

"that the determination of the suit will necessarily involve and require the construction of the laws of the United States," or "that there is a dispute between the parties as to the construction of the several Acts of Congress referred to," because:—

1. It is not enough for the party to say that the suit is one arising under the laws of the United States. He must state the facts so as to enable the Court to see whether the right he claims does really and substantially depend on their construction.

Gibbs v. *Crandell,* 120 U. S. 109; 30 L. Ed. 590;
Continental Life Insurance Co. v. *Rhoads,* 119 U. S., 237; 30 L. Ed., 380;
Little York Gold Washing & Water Co. v. *Keyes,* 96 U. S., 204; 24 L. Ed., 656.

2. Such allegations would be mere conclusions of law and ineffectual.

Gould v. *Evansville,* 91 U. S., 526; 23 L. Ed., 416;
Fogg v. *Blair,* 139 U. S., 118; 35 L. Ed., 104.

3. Such statements that there was such condition would not raise a Federal question, because the statement is unnecessary in averring or proving plaintiff's cause of action.

Joy v. *St. Louis,* 201 U. S., 332; 50 L. Ed., 776.

What, then, are the facts? Upon the construction of what "laws of the United States," as applied to the facts, does the determination of this suit depend?

POINT ONE

The facts, as stated by the Honorable Circuit Court of Appeals for the Eighth Circuit in its opinion, can best be stated by "unfolding the facts and the law together."

From the bill in this case (printed transcript, p. 4), the following facts appear:

> "That George Franklin Berryhill was a Creek Indian and a citizen of the Creek Nation, and that his name appeared on the approved rolls of the Creek Nation as a citizen by blood of said nation.
>
> "That in the month of May, A. D., 1901, there was born to said George Franklin Berryhill and his wife, a son, who was named Andrew J. Berryhill.
>
> "That said Andrew J. Berryhill departed this life in the month of November, A. D., 1901, intestate and unmarried; that he left no issue, nor brother nor sister surviving him."

The first Act of Congress affecting the enrollment of citizens and the allotment of lands in the Creek Nation, as far as this case is concerned, is an Act known as the "Original Creek Agreement," "made with the Creek Nation in the year 1900, and approved by Congress on March 1, 1901 (31 Stat. L., 861)." This Act prohibited the enrollment of any citizen after the ratification of said agreement; and this agreement was ratified by the Creek Tribe on May 25, 1901.

Section 28 of said Act provided:

> "No person, except as herein provided, shall be added to the rolls of citizenship of said Tribe after the date of this agreement, and no person whomsoever

shall be added to said rolls after the ratification of this agreement.

"All citizens who were living on the first day of April, eighteen hundred and ninety-nine, entitled to be enrolled under Section twenty-one of the Act of Congress approved June twenty-eighth, eighteen hundred and ninety-eight, entitled, 'An Act for the Protection of the People of the Indian Territory, and for Other Purposes,' shall be placed upon the rolls to be made by said Commission under said Act of Congress, and if any such citizen has died since that time, or may hereafter die, before receiving his allotment of lands and distributive share of all the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and be allotted and distributed to them accordingly.

"All children born to citizens entitled to enrollment, up to and including the first day of July, nineteen hundred, and then living, shall be placed on the rolls made by said Commission; and if any such child die after said date, the lands and moneys to which he would be entitled, if living, shall descend to his heirs according to the laws of descent and distribution of the Creek Nation, and shall be allotted and distributed to them accordingly.

"The rolls so made by said Commission, when approved by the Secretary of the Interior, shall be the final rolls of citizenship of said tribe, upon which the allotment of all lands and the distribution of all moneys and other property of the tribe shall be made, and to no other person."

It will be particularly noticed that, by this Act, neither children who were born after July 1st, 1900, nor, if deceased, their heirs, were entitled to an allotment. Therefore, inasmuch as Andrew J. Berryhill was not born until May, 1901, and died in the month of November, 1901, neither

he, nor his heirs, were entitled to an allotment or to any rights under this Act.

The next Act of Congress affecting the questions in this case is the Indian Appropriation Act of May 27, 1902 (32 Stat., L., 245), in which Act Congress provided for the enrollment of Creek Indian children born subsequent to July 1, 1900. The part of that Act necessary to be considered, is as follows:

> "*Provided further,* that all children born to duly enrolled and recognized citizens of the Creek Nation up to and including the twenty-fifth day of May, 1901, and then living, shall be added to the rolls of citizenship of said nation made under the provisions of an Act entitled 'An Act to Ratify and Confirm an Agreement With the Muskogee, or Creek, Tribe of Indians, and for Other Purposes,' approved March 1, 1901, and if any such child has died since the 25th day of May, 1901, or may hereafter die, before receiving his allotment of land and distributive share of the funds of the tribe, the lands and money to which he would be entitled, if living, shall descend to his heirs and be allotted and distributed to them accordingly; and, *provided further,* that the Act entitled, 'An Act to Ratify and Confirm an Agreement With the Muskogee, or Creek, Tribe of Indians, and for Other Purposes,' approved March 1, 1901, in so far as it provides for descent and distribution according to the laws of the Creek Nation, is hereby repealed, and the descent and distribution of lands and moneys provided for in said Act shall be in accordance with the provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, in force in the Indian Territory."

This Act changed the Act of March 1, 1901 (31 Stat. L., 861), in the following respects:

(1) It authorized the enrollment and allotment of

Creek children born up to and including May 25, 1901, thus extending the time from July 1, 1900.

(2) It further provided, that where any such child died since May 25, 1901, without being enrolled and receiving his allotment, an allotment should be made to the heirs of such child; and who the heirs were should be determined by the laws of the State of Arkansas, in force in the Indian Territory.

The next Act of Congress affecting the questions in this case, is the Act of Congress of June 30, 1902 (32 Stat. L., 500), known as the "Supplmental Creek Agreement;" Sections 6, 7, 16 and 17 of which Act are as follows:

"*Descent and Distribution.*

"*6.* The provisions of the Act of Congress approved March 1, 1901 (31 Stat. L., 861), in so far as they provide for descent and distribution according to the laws of the Creek Nation, are hereby repealed, and the descent and distribution of land and money provided for by said Act shall be in accordance with Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, now in force in Indian Territory; *Provided,* that only citizens of the Creek Nation, male and female, and their Creek descendants, shall inherit lands of the Creek Nation; and, *provided further,* that if there be no person of Creek citizenship to take the descent and distribution of said estate, then the inheritance shall go to non-citizen heirs in the order named in said Chapter forty-nine.

"*Rolls of Citizenship.*

"*7.* All children born to those citizens who are entitled to enrollment, as provided by the Act of Congress approved March 1, 1901 (31 Stat. L., 861), subsequent to July 1, 1900, and up to and including May 25, 1901, and living upon the latter date, shall be

placed on the rolls made by said Commission. And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands and distributive share of the funds of the tribe, the lands and moneys to which he would be entitled if living shall descend to his heirs as herein provided, and be allotted and distributed to them accordingly.

"*16.* Lands allotted to citizens shall not in any manner whatever, or at any time, be encumbered, taken or sold to secure or satisfy any debt or obligation, nor be alienated by the allottee or his heirs, before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior. Each citizen shall select from his allotment forty acres of land, or a quarter of a quarter section, as a homestead, which shall be and remain non-taxable and inalienable, and free from any incumbrance whatever, for twenty-one years from the date of the deed therefor, and a separate deed shall be issued to each allottee for his homestead, in which this condition shall appear.

"* * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph, shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity.

"*17.* Section 37 of the agreement ratified by said Act of March 1, 1901, is amended, and as so amended is re-enacted to read as follows:

"'Creek citizens may rent their allotments, for strictly non-mineral purposes, for a term not to exceed one year for grazing purposes only, and for a period not to exceed five years for agricultural purposes, but without any stipulation or obligation to renew the same. Such leases for a period longer than one year for grazing purposes, and for a period longer than five years for agricultural purposes, and leases for mineral purposes, may also be made with the ap-

proval of the Secretary of the Interior, and not otherwise. Any agreement or lease of any kind or character violative of this paragraph, shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity'."

We call the attention of the Court to the following matters set forth by said Act of June 30, 1902:

(1) Where a Creek child entitled to enrollment, living May 25, 1901, thereafter dies without receiving his allotment, the allotment to which he would have been entitled was to be made to his heirs; and the personnel of the heirs was to be determined by the laws of the State of Arkansas.

(2) Lands in the Creek Nation were to be inalienable until the 8th day of August, 1907, five years from the date of the ratification of this Supplemental Agreement.

(3) Oil and gas mining leases on lands in the Creek Nation could be made by the Creek allottees with the approval of the Secretary of the Interior, instead of being made by the Secretary of the Interior, as was provided for under the Act approved April 28, 1898.

(4) Any oil and gas mining lease made by a Creek citizen, and not approved by the Secretary of the Interior, was void and not susceptible of ratification.

By reference to the bill (printed transcript, p. 4), it appears that the name of Andrew J. Berryhill, the child, was placed on the approved Creek roll of said Nation on the 8th day of October, A. D., 1902; it also appears:

"That thereafter, and on the 10th day of October, A. D., 1904, the United States of America, together with the Creek Nation, did execute a deed or patent to said lands, wherein and whereby the United States of America and the said Creek Nation did sell and con-

vey unto '*the heirs of Andrew J. Berryhill, a Creek Indian,*' the above described lands" (referring to the lands in controversy).

So it was some time after the Act of June 30th, 1902 (32 Stat. L., 500), and under the terms of that Act, that the lands in controversy were allotted and patented by the United States and the Creek Nation to the "heirs of Andrew J. Berryhill, deceased," without naming the heirs. Andrew J. Berryhill died in November, 1901, some nine months prior to the force and effect of either the Act of May 27, 1902 (32 Stat. L., 245), or the Act of June 30, 1902 (32 Stat. L., 500); so that at no time during his life did he have any right whatever to enrollment as a Creek citizen, or have any right to an allotment of land in the Creek Nation. *The inception of the right was therefore necessarily in his heirs.*

The provisions of Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, in force in the Indian Territory, referred to in both the Act of May 27, 1902 (32 Stat. L., 245), and the Act of June 30, 1902 (32 Stat. L., 500), were pnt iu force by the Act of Congress of May 2, 1890 (26 Stat. L., 182), Section 31 thereof providing specifically that said Chapter 49 is "hereby extended over and put in force in the Indian Territory until Congress shall otherwise provide."

The Circuit Court of Appeals for the Eighth Circuit in the case of *Leak Glove Mfg. Co.* v. *Needles,* 69 Fed. 69, in discussing the question as to whether or not the Statutes of Arkansas put in force by Act of May 2, 1890, were laws of the United States, said:

> "Section —— of Mansfield's Digest is the law of the Indian Territory, just as much as if it had been enacted *in haec verba.* * * * *In the Indian Territory it is an Act of Congress, and has the same force and ef-*

fect as if it had been originally adopted by Congress, without any reference to its prior existence in the State of Arkansas."

See, also,

Canary Oil Co. v. *Standard Asphalt and R. Co.*, 182 Fed. 663;

Boyd v. *Great Western, etc.*, 189 Fed. 115.

As stated by the Circuit Court of Appeals in the above case, as to the question of whether or not the provisions of Chapter 49 of the Statutes of Arkansas were laws of Congress, "there would seem to be no room for two opinions." The only sections of the laws of the United States known as Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, necessary to the determination of this case, are Sections 1 and 10. Section 1 (M. D. Sec. 2522), and Section 10 (M. D. 2531), are as follows:

"*Sec. 1.* When any person shall die, having title to any real estate of inheritance, or personal estate, not disposed of, nor otherwise limited by marriage settlement, and shall be intestate as to such estate, it shall descend and be distributed in parcenary, to his kindred, male and female, subject to the payment of his debts and the widow's dower, in the following manner:

First—To children, or their descendants, in equal parts.

Second—If there be no children, then to the father, then to the mother, then to the brothers and sisters, or their descendants, in equal parts.

Third—If there be no children, nor their descendants, father, mother, brothers or sisters, nor their descendants, then to the grandfather, grandmother, uncles and aunts and their descendants, in equal parts, and so on in other cases, without end, passing to the nearest lieneal ancestor, and their children and their descendants, in equal parts."

> "*Sec. 10.* In cases where the intestate die without descendants, if the estate come by the father, then it shall ascend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall ascend to the mother and her heirs, but if the estate be a new acquisition, it shall ascend to the father for his lifetime, and then descend, in remainder, to the collateral kindred of the intestate in the manner provided in this Act; and, in default of a father, then to the mother, for her lifetime; then to descend to the collateral heirs as before provided."

It is not proposed, in this brief upon the jurisdiction of this Court, to discuss the merits. However, it is proper to say that, inasmuch as Andrew J. Berryhill was born in May, 1901, and died in the month of November, 1901, that he, under the Acts of Congress, and under the treaties and agreements entered into by the United States and the Creek Nation, at no time during his lifetime was entitled to enrollment as a citizen of the Creek Nation, and at no time during his lifetime had he even the least vestige of any right, title or interest in or to any of the lands of the Creek Nation.

Inasmuch as the Act of May 27, 1902 (32 Stat. L., 245), was by joint resolution of both Houses of Congress suspended in its operation until July 1, 1902 (32 Stat., L., 742), at which date the Act of June 30, 1902 (32 Stat., L., 500), was approved by the President; the name of Andrew J. Berryhill not being placed on the rolls until October 8, 1902, it was placed on said roll under the provisions of Sections 6 and 7 of the Act of June 30, 1902 (32 Stat., L., 500); and, as hereinbefore stated, it was under the terms of that Act that the lands in controversy were allotted and patented by the United States to the "heirs of Andrew J. Berryhill, deceased," without naming the heirs.

By reference to the bill (printed transcript, p. 5), it will be seen that, on or about the 24th day of March, A. D., 1906, said George Franklin Berryhill (the father of the child), did make, execute and deliver a certain oil and gas lease, under the rules and regulations of the Department of the Interior, promulgated under, and by express authority of, the Act of June 30th, 1902 (32 Stat. L., 500). It is under this oil and gas mining lease so executed under the rules and regulations of the Department of the Interior, that the appellant in his bill sets up his right and title in this case.

And the first question arising in the determination of this case upon its merits, at the outset, requires an interpretation of that part of Section 7 of the Act of June 30, 1902 (32 Stat., L., 500)—the section under which the lands in this case were patented—which provides:

> "And if any such child has died since May 25, 1901, or may hereafter die, before receiving his allotment of lands, and distributive share of the funds of the Tribe, the lands and moneys to which he would be entitled, if living, *shall descend to his heirs as herein provided*, and be allotted and distributed to them accordingly."

"As herein provided," of course, having reference to Chapter 49 of Mansfield's Digest of the Statutes of Arkansas, referred to in the preceding Section 6.

Inasmuch as Andrew J. Berryhill died in November, 1901, without any right to an allotment in the Creek Nation, and inasmuch as his name was placed on the approved roll after his death, by virtue of a right which accrued after his death, and inasmuch as in October, 1904, three years after the death of said Andrew J. Berryhill, a deed was executed, wherein the lands in controversy were "granted

and conveyed unto the heirs of Andrew J. Berryhill, a deceased Creek Indian" (see bill, printed tr., p. 5), the question arises whether or not the grantee or grantees in said grant take title by purchase directly from the United States and the Creek Nation, that is, by grant from the United States and the Creek Nation, or whether by virtue of the phrase in said Section 7 of the Act of June 30, 1902 (32 Stat. L., 500), "shall descend," the grantee or grantees in said patent take by descent. Inasmuch as the "one absolutely necessary prerequisite to title by descent is that the ancestor must be seized of the estate at the time of his death" (2 Blackstone Com., pp. 209 & 240; Underhill on Wills, 810, quoting from 1 Preston's Estates, 36; Washburn on Real Property, Vol. 3, p. 4), the phrase "shall descend," as used in Section 7 of the Act of June 30, 1902 (32 Stat., L., 500), requires a construction by this Court; and by this construction of that phrase the title or right set up by the appellant in his bill below, may be defeated or may be sustained. The construction given to that phrase by this Court is material to the determination of this case, as far as the allegations of facts in the bill are concerned, in this respect:

If it be held by this Court, as was held by it in the case of *Hall* v. *Russell*, 101 U. S., 503; 25 L. Ed., 829, that the phrase, "shall descend," as used in this section, means nothing more than "to pass," or "to go," then who "the heirs of Andrew J. Berryhill," as described in the patent from the United States, are, must be determined by the provisions of that section of the law of the United States known as Section 1 of Chapter 49, of Mansfield's Digest; and under the provisions of that section, the lands in controversy, covered by said patent of the United States, "to the heirs of Andrew J. Berryhill," would go to the father, George Franklin Berryhill, in fee simple, and the said George Franklin Berryhill, by reason of his owner-

ship of said fee to said lands, could execute a valid oil and gas mining lease under the rules and regulations of the Department of the Interior, and then the right or title of the appellant, as set out in his bill, to-wit, the oil and gas mining lease executed by the said George Franklin Berryhill, would be sustained.

On the other hand, if the word "descend," being technically inapplicable, be construed by this Court as it was, in fact, construed by the Circuit Court of the Eastern District of the State of Oklahoma (see opinion, printed transcript, p. 256), to mean, to use the words of the United States Circuit Court for the Eastern District of Oklahoma, "that the heirs of enrolled members, dying before allotment, should take the allotments as if their ancestors had received their allotments before death," then that section of the laws of the United States known as Section 10, of Chapter 49, of Mansfield's Digest, must be looked to, to ascertain who the grantee was, or grantees were, under the patent from the United States. And, in addition thereto, the very terms of this section of the law of the United States must be interpreted under the peculiar conditions in this case; for in that section, it is provided that, where the intestate died without descendants, as appears to be the case under the allegations of the bill in this case,

> "If the estate came by the father, then it shall descend to the father and his heirs; if by the mother, the estate, or so much thereof as came by the mother, shall descend to the mother and her heirs; but if the estate be a new acquisition, it shall descend to the father during his lifetime, and then to the collateral kindred of the deceased, in the manner provided in this section."

The question, then is, how shall this land, granted by an Act of Congress of June 30, 1902 (32 Stat. L., 500), be treated? Shall it be treated, as was done by the Circuit

Court for the Eastern District of Oklahoma, as a new acquisition? If so, then the land shall descend to the father, George Franklin Berryhill, merely for his lifetime. If so, George Franklin Berryhill, having but a life estate, could not execute a valid oil and gas lease upon said lands; and thus would the right or title set up by the appellant in his bill below, to-wit, the oil and gas mining lease, be defeated; for it is a long settled rule that "a tenant for life of lands, containing minerals, oil or gas, cannot open any new mine or well, or lease the lands to others for this purpose." See opinion of the Circuit Court for the Eastern district of Oklahoma (Tr., p. 269). This was the construction placed upon the grant by the Circuit Court for the Eastern District of Oklahoma, and consequently the right or title set up by the appellant below was defeated.

On the other hand, if the grant of the lands in controversy under and by virtue of Section 7 of the Act of June 30, 1902 (32 Stat., L., 500), shall, by virtue of the construction of the phrase therein, "shall descend," be treated not as a new acquisition, but as an inheritance from his parents, then would George Franklin Berryhill, the father, be deemed the owner in fee simple of the property in controversy, and in such case, the title or right set up by the appellant in his bill would be sustained.

Thus will it be seen that the allegations of the bill abound in Federal questions, and, as said by Justice Brewer for this Court in *Henningsen* v. *U. S. Fidelity & Guaranty Co.*, 208 U. S. 409; 52 L. Ed., 550:

> "Diversity of citizenship was, it is true, alleged in the bill, but grounds of suit and relief were also based on the Statutes of the United States, as from the discussion of the merits will be seen. Those statutes entered as elements into the decision of the Circuit Court of Appeals, and were necessary elements."

Here may be noticed the objection of appellees to the jurisdiction of this Court as set forth in their brief under "Point Four," that

> "The fact that the plaintiff in a case claims title by virtue of a patent from the United States does not raise a Federal Question;"

citing,

> *Florida Central & P. R. Co.* v. *Bell*, 176 U. S. 321; 44 L. Ed., 486;
>
> *Blackburn* v. *Portland Gold Mining Co.*, 175 U. S. 571; 44 L. Ed., 276;
>
> *Romie* v. *Casanova*, 91 U. S. 379; 23 L. Ed., 374;
>
> *Bonin* v. *Gulf Company*, 198 U. S. 115; 49 L. Ed., 970.

To this list should be added the case of *Joy* v. *St. Louis*, 210 U. S. 332; 50 L. Ed., 776—a case to which we will hereinafter pay some attention.

We agree with counsel that "the *mere fact* that the title of plaintiff comes from a patent, or under an Act of Congress, does not show that a Federal question arises" (*Joy* v. *St. Louis, supra*); or that that fact "for that reason *alone* presents no Federal question" (*Blackburn* v. *Portland Gold Min. Co., supra*); or that "the *mere assertion* of a title to land derived by the plaintiffs under and by virtue of a patent grant by the United States, presents no question which, *of itself*, confers jurisdiction on a Circuit Court of the United States" (*Florida Central* v. *Bell*, and *Bonin* v. *Gulf Company, supra*). And appellant does not assert, nor attempt to assert, such proposition. On the contrary, as shown above, appellant contends that the Federal question in this case is presented by the construction of the very Act under which the land in this case was granted to "the heirs of Andrew J. Berryhill, deceased," to-wit, Sec-

tion 7 of the Act of June 30th, 1902 (32 Stat., L., 500); that the Federal question is presented upon a condition anterior to the issuance of the patent by the United States and that by the determination of that Federal question, the question who the grantee is, or grantees are, described in that patent as "the heirs of Andrew J. Berryhill," will be determined.

It will thus be seen that the Federal question set up by the appellant in his bill is not based upon the "mere assertion" that he derived his title under and by virtue of a patent grant by the United States, or upon the "mere fact" that the title was so derived, and that therefore the cases cited by learned counsel are not in point.

The case at bar is rather of that class of cases to which belongs the case of *Spokane Falls & N. Ry. Co.* v. *Ziegler*, 167 U. S. 66; 42 L. Ed., 79; the case of *Northern Pacific Ry. Co.* v. *Soderberg*, 188 U. S. 526; 47 L. Ed., 575; and the case of *McGilvra* v. *Ross*, 215 U. S. 70; 54 L. Ed., 95; a case to which we will pay further attention hereinafter.

The case of *McGilvra* v. *Ross*, was decided by this Court on November 15, 1909, and is one of the latest, if not the latest, pronouncement upon this subject. That case, as appears by the statement thereof, was an action in which title was asserted to certain lands by virtue of certain patents issued by the United States to certain lands. The Federal questions were, as stated by Mr. Justice McKenna:

> "*(1.)* The validity and *effect* of the several patents of the United States in respect to the claim of ownership thereunder, as set forth in the bill of complaint;
>
> *(2.)* The invocation of the protection of the 14th Amendment of the Federal Constitution by these plaintiffs 'against the threatened taking of their property' by

'the several Acts of the Legislature of the State of Washington and the procedure directed thereunder'."

Mr. Justice McKenna, speaking for the Court, said:

"It is manifest that the first is the primary question. If the appellants did not derive the rights contended for by the patents, they have no rights to be impaired, even assuming, as we have assumed in this discussion, that the action of the State has proceeded far enough to be a trespass upon or an impairment of them. *But whether such rights passed involves the construction of the Acts of Congress under which the patents issued, and, necessarily, of the effect of the patents, and presents a Federal question, if prior decisions have not defined such rights and removed them from controversy.*"

The Court then held that the question presented by the bill —that is, the so-called Federal question—was no longer open to discussion, for the reason that it had been decisively settled theretofore, and that *for that reason* there was no Federal "question." It did not hold that the bill contained the "mere assertion" that the title was derived from the United States, and that for that reason no Federal question was presented.

The *McGilvra* case is like the case at bar, and it may be said of this case, as was said of that case, whether the appellant has any such right or title as claimed by him, "involves the construction of the Acts of Congress under which the patents issued, and, necessarily, of the effect of the patents, and presents a Federal question."

It follows that a Federal question is presented by the bill in the case at bar, and the jurisdiction of this Court is thus maintained.

POINT TWO

From an inspection of the bill filed in this cause (printed Tr., p. 5), it will be seen that the following allegation appears therein:

> "That the defendant, Kiefer Oil and Gas Company, *is* a corporation, duly organized on the 26th day of April, 1907, *under and by virtue of the laws of the United States in force in the Indian Territory.*"

The Act of Congress under which the defendant, Kiefer Oil and Gas Company, was organized, is the Act of February 19th, 1901 (31 Stat. L., 794), entitled, "An Act to Put in Force in the Indian Territory Certain Provisions of the Laws of the State of Arkansas Relating to Corporations." As hereinbefore shown, these sections of the Arkansas law adopted by an Act of Congress became as much a part of the Act adopting them as if set forth "*in haec verba*" therein.

Leak Glove Co. v. *Needles*, 69 Fed., 68;
Boyd v. *Great Western, etc., Co.*, 189 Fed. 115.

For nearly a century, and for a period equal to nearly one-half of the life of this Republic; ever since the case of *Osborn* v. *The Bank of the U. S.*, 9 Wheat. 739; 6 L. Ed., 204, the opinion being written by Chief Justice MARSHALL, decided by this Court in the year 1824, down to the case of *In re Dunn*, 212 U. S., 374; 53 L. Ed. 558, decided by this Court on February 23, 1909, and the case of *Texas & Pac.* v. *Eastin & Knox*, 214 U. S., 153; 53 L. Ed., 946; decided by this Court on May 17, 1909:

> "An action brought against a corporation created by an Act of Congress * * * is a suit arising under the Federal Constitution or laws."

As stated by Justice PECKHAM in the case of *In re Dunn, supra:*

> "As the corporation derives all its rights from the laws of Congress, a suit brought against it on account of its action arises under the Constitution or laws of the United States."

This exact question has been determined so often by this Court during the course of the last one hundred years, and so often by the Circuit Courts of Appeals, in turn, that the doctrine must be held to be forever foreclosed against further discussion. In the language of the Court in the case of *Union Pac.* v. *Myers,* 115 U. S., 11; 20 L. Ed., 323,

> "We do not propose to go into a lengthy argument on the subject; we think that the question has been substantially decided long ago by this Court. The exhaustive argument of Chief Justice MARSHALL in the case of *Osborne* v. *The Bank of the United States,* 9 Wheat. 817-828, delivered more than sixty years ago, and always acquiesced in, renders any further discussion unnecessary to show that a suit by or against a corporation of the United States is a suit arising under the laws of the United States."

Among the many cases of this court, and of the Circuit Courts of Appeals, in which the doctrine has been iterated and reiterated, may be mentioned the following:

Osborn v. *The Bank of U. S.,* 9 Wheat. 739; 6 L. Ed. 204;

Pacific Removal Cases, 115 U. S. 1; 29 L. Ed. 319;

Northern Pac. Ry. Co. v. *Amato,* 144 U. S. 465; 36 L. Ed. 506;

Butler v. *National Home for Dis. Vol. Soldiers,* 145 U. S. 64; 36 L. Ed. 346;

Texas & Pacific Ry. Co. v. *Cox,* 145 U. S. 593; 36 L. Ed. 829;

Union Pac. v. *Harris*, 158 U. S. 326; 39 L. Ed. 1003;

Wash.-Idaho Ry. Co. v. *Coeur d'Alene Ry. Co.*, 160 U. S. 77; 40 L. Ed. 346;

Texas & Pacific v. *Gentry*, 163 U. S. 353; 41 L. Ed. 186;

Sup. Lodge K. of P. v. *Kalinski*, 163 U. S. 289; 41 L. Ed. 163;

Texas & Pacific Ry. Co. v. *Cody*, 166 U. S. 606; 41 L. Ed. 1132;

Smith, Receiver, v. *Rieves*, 178 U. S. 436; 44 L. Ed. 1140;

Mo. P. Ry. Co. v. *Soderberg*, 188 U. S. 526; 47 L. Ed. 575;

Texas & Pacific Ry. Co. v. *Eastin & Knox*, 214 U. S. 153; 53 L. Ed. 946;

In re Dunn, 212 U. S. 374; 53 L. Ed. 558;

Wolf v. *C. O. & G. Ry. Co.*, 133 Fed. 601;

Sup. Lodge K. of P. v. *England*, 94 Fed. 369 (8th Cir.).

Sup. Lodge K. of P. v. *Hill*, 76 Fed. 468 (4th Cir.).

U. S. Freehold Land & E. Co. v. *Gallegos*, 89 Fed. 769.

The question with reference to the exact condition presented in this case was aptly reviewed by the Circuit Court for the Western District of Kansas in the case of *Canary Oil Co.* v. *Standard Asphalt & Rubber Co.*, 182 Fed. 663, decided September 22, 1909, POLLOCK, District Judge, writing the opinion, and we know of no better way of setting forth our views than by setting out here so much of the opinion as is pertinent:

> "The sole question presented is this: Does the plaintiff owe its existence to an Act of the Congress of the United States as contradistinguished from the laws of a Territory of the United States, for, if so, this is a

controversy arising under the Constitution and laws of the United States and was removable from the state court. *Butler* v. *National Home for Soldiers,* 144 U. S. 64, 12 Sup. Ct. 581; 36 L. Ed. 346; *Pacific Removal Cases,* 115 U. S. 1, 5 S. C. R. 1113; 29 L. Ed. 319; *Knights of Pythias* v. *Kalinski,* 163 U. S. 289; 16 S. C. R. 1047, 41 L. Ed. 163; *Texas & Pacific* v. *Eastin & Knox* (decided by the Supreme Court, May 17, 1909), 214 U. S. 153; 29 S. C. R. 564; 53 L. Ed. 946. If, however, the plaintiff was not created by Act of Congress, but under territorial laws, the case was not removable, and the motion to remand must be sustained. *Maxwell* v. *Federal, etc., Co.,* 155 Fed. 110, 83 C. C. A. 570, and cases cited.

"In my opinion, plaintiff was created, organized and owes its existence to an Act of Congress, and not to a territorial law, and for this reason: corporations of necessity are purely creatures of the law. Without law no corporation can exist. Prior to the 18th day of February, 1901, when Congress put in force in the Indian country certain provisions of the statutes of the State of Arkansas relating to the formation and regulation of corporations, the plaintiff could not have been created in that country, for, as statutes of the State of Arkansas merely, they had no force outside of the territorial limits of that state. The Indian country, sometimes in common parlance called the Indian Territory, possessed none of the powers of government ordinarily conferred by Congress on the territories of the United States created by congressional enactment, as did the Territory of Oklahoma and others. The Indian country was unorganized territory of the United States, over which the national government had exclusive dominion and control and over which the Congress alone had the power to legislate. In this condition of affairs, the Congress deemed it proper to permit the organization of certain corporations in that country on such terms and under such restrictions as it might impose. For this purpose it adopted and put

in force in the Indian country by the act in question certain provisions of the statutory law of the State of Arkansas. No doubt the thought which impelled this action was the familiarity of the people of the Indian country with the laws of the neighboring State of Arkansas. No power but that possessed by Congress could have done this, and when done, the act was to all intent and for all purpose as much an Act of Congress as is the act of the Legislature of a state an enactment of that state when it adopts and puts into force the laws of a sister state on any given subject; or as much a law of the state as when it legislates directly and independently with the reference to any given matter. As tending to support this view of the case, see *In re Grayson*, 3 Ind. T. 497, 61 S. W. 984; *Late Corporation, etc.*, v. *U. S.*, 136 U. S. 44; 10 S. C. R. 792; 34 L. Ed. 478; *U. S.* v. *McMillan*, 165 U. S. 503; 17 S. C. R. 395; 21 L. Ed. 805; *Spokane Falls, etc., R. Co.* v. *Ziegler*, 167 U. S. 65; 17 S. C. R. 728, 42 L. Ed. 79; *Utter* v. *Franklin*, 172 U. S. 416; 19 S. C. R. 183; 43 L. Ed. 498.

"However, it is contended by plaintiff, Congress does not possess the power to create by direct enactment a private corporation, such as is plaintiff; hence, of necessity, it must be a territorial corporation.

"As has been seen, the Indian country was under the exclusive control of Congress; it possessed no power of legislation either independent of or dependent upon the authority of Congress; hence for plaintiff to deny the power of Congress to enact the law under which it was organized would be to deny the source and power of its own creation and existence.

"Again, it is contended the case of *U. S.* v. *Pridgeon*, 153 U. S. 48; 14 S. C. R. 746; 38 L. Ed. 631, is opposed to the conclusion here reached. In that case Congress by act of May 2, 1890 (Act May 2, 1890, c. 182, 26 Stat. 81), created the Territory of Oklahoma, defined its boundaries, enacted a territorial form of government for it, and put in force in the territory so

created the Criminal Code of the state of Nebraska, so far as applicable until the date of the adjournment of the first territorial Legislature, and it was there held, adopting the views of the territorial Supreme Court in *ex parte Larkin*, 1 Okl. 53, 25 Pac.745, 11 L. R. A. 418, that an offense committed against the provisions of the Criminal Code of Nebraska during the term it was so in force was an offense against the laws of the territory, triable in the territorial courts, and not an offense against the laws of the general government, triable in its courts, or in the territorial courts sitting with the powers of a Federal Court.

"However, to my mind, the doctrine there announced is not applicable here, and for this reason: Congress by the organic act creating the territory of Oklahoma, had made provision for its local self-government through power exercised by its executive, legislative and judicial branches. It had created territorial courts and conferred upon them jurisdiction and the exercise of judicial power, but had prescribed no rule of procedure therein, and had not defined what acts should be punishable in such courts. This was left to the Legislative branch of the territory created. However, of necessity, some time must elapse before a Legislature could be chosen in conformity to the provisions of the act, assemble and perform its duties. Therefore the Congress provided such acts as constituted an offense against the laws of Nebraska, when done in that state, done in the territory so created, should constitute an offense against the laws of the territory, be triable by and punishable in its courts. Here, as has been seen, Congress, conferred no powers of self-government on the Indian country. It remained unorganized. Congress retained and exercised all such powers directly, and in so doing permitted the creation of plaintiff as a corporation in the Indian country where theretofore no such right existed under the provisions of the statutes of Arkansas adopted for such purpose in that country. In other words, in authorizing the incorporation of plaintiff, Congress was

legislating directly covering a subject matter over which it had exclusive and absolute power; but in establishing the Criminal Code of Nebraska in Oklahoma Territory Congress was legislating for a temporary purpose for one branch of an agency it had created by the organic act, merely doing what that one branch of the agency it had created would have done had it been possible for it to meet and act. What was done was for and in the place and stead of the exercise of a power theretofore conferred on one department of an agency not organized for action. * * * Therefore a right of action asserted by it arises under and involves the Constitution or laws of the United States. And, as in its petition it alleges 'its true place of business and its correct postoffice address are Independence, Kan.,' which is within the division of this district, I am convinced from the opinion of the Supreme Court in the very recent case of *in re Dunn* (decided by that court February 23d of this year), 212 U. S., 374; 29 S. C. R., 299; 53 L. Ed., 558, it might have originally commenced this suit in this court."

No distinction can in any way be made between the laws of the United States under which the Kiefer Oil and Gas Company was organized and the laws of the United States under which the order of Knights of Pythias was organized (*K. of P.* v. *Kalinski*, 163 U. S., 289; 41 L. Ed. 163) or the National Home for Soldiers (145 U. S. 64; 36 L. Ed., 346); or the Union Pacafic Railway Company and Texas and Pacific Railway Co. (*Pacific Removal Cases*, 115 U. S., 1; 29 L. Ed., 319) or the Bank of the United States (*Osborn v. Bank*, 9 Wheat. 739, 6 L. Ed., 204).

True it is that the Act of Congress applicable to the District of Columbia permitting the order of Knights of Pythias to become organized as a corporation, was authorized under that clause of Section 8 of Article 1 of the Federal Constitution reading:

> "To exercise exclusive legislation in all cases whatsoever over such district."

But it is also true that the act of Congress applicable to the Indian Territory permitting the Kiefer Oil and Gas Company to become organized as a corporation, was authorized under another article of equal dignity and of equal validity and in the same Constitution, to-wit: Section 3 of Article IV.

In addition to that authority, it passed said act by virtue of that fundamental law of Nations which not only permits but also requires a Nation to govern and control its territory and its subjects.

> *Downes v. Bidwell*, 182 U. S. 244; 45 L. Ed., 1088.
> *Late Corporation v. U. S.* 136 U. S. 1; 34 L. Ed. 478.
> *Utter v. Franklin*, 172 U. S. 416; 43 L. Ed. 498.
> *Dorr* v. *U. S.*, 195 U. S. 138; 49 L. Ed. 128;
> *McCulloch* v. *Maryland*, 4 Wheat. 316; 4 L. Ed. 579.

No distinction can be made between the Acts of Congress under which the corporation was organized in the District of Columbia in the Kalinski case and under the act of Congress under which the corporation in this case was organized in the Indian Territory; both acts were in a sense, local legislation, but both were enacted under Constitutional authority.

This court expressly held that it had jurisdiction in the Kalinski case, because the suit arose under the laws of the United States. As said by the Circuit Court of Appeals for the Eighth Circuit in the case of *Sup. Lodge K. of P. v. England*, 94 Fed., 369;

> "In *Supreme Lodge* v. *Kalinski*, 163 U. S. 289, the Supreme Court failed to dismiss the case for want of jurisdiction, and although it is true, as claimed by counsel, that the question of jurisdiction was not raised, yet the statement of the case showed that it was originally brought in a state court, and removed to the Federal Court upon the ground that it was a Federal corpora-

tion. The Supreme Court does not have to be moved to notice a question of jurisdiction. It is always on the alert for the question, and is quick to discover a case of which the lower court had no jurisdiction. It is highly improbable that the court overlooked the question. *It is not the domicile of a corporation created by an Act of Congress that confers jurisdiction upon the Federal Courts, but the fact that it has been so created;* and any suit by or against it arises under a law of the United States."

As said by the court in *Defiance Water Co.* v. *Defiance*, 191 U. S., 194, 48 L. Ed., 144:

> "The fundamental question of jurisdiction presents itself on every writ of error, or appeal, and must be answered by the court whether propounded by counsel or not."

To the same effect:

> *Fore River Shipbuilders Co. v. Hagg*, 219 U. S., 175; 31 S. C. R. 185.

So it follows that this court expressly held that the suit in the Kalinski case was one arising under "the laws of the United States" because jurisdiction could be maintained in no other way.

Some attention has been given the opinion of the Circuit Court for the Eastern District of Oklahoma in the case of *Boyd* v. *Great Western Coal & Coke Co.*, 189 Fed. 116; wherein the court held in effect that because Congress could have provided for the incorporation in an indirect way—that is, through a territorial legislature—although it in fact did not; that fact divested the act of Congress of February 18, 1901, of the attributes of a law of the United States, and therefore an incorporation under that act was not an incorporation under the laws of the United States. The fallacy of such reasoning is indeed too obvious to merit

much attention. Suffice it to say that Congress did not see fit to proceed in that manner but saw fit to provide for incorporation under direct act of Congress. The Kiefer Oil and Gas Company might have been incorporated under the laws of the State of New York, but it was not; and therein lies the difference.

The court in the *Boyd* case overlooked another important principle of law. As stated by Chief Justice MARSHALL in the case of *Osborn v. Bank of United States, supra*, it is the power given the corporation in the act of Congress *creating* the corporation that makes the case of a corporation organized thereunder one "arising under a law of the United States," not the domicile of the corporation or the question of whether or not Congress has delegated the right of supervision, visitation or control over such corporations to another. Witness the language:

> "The charter of the incorporation not only creates it, but gives it every faculty which it possesses. The power to acquire rights of any description, to transact business of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creation of the law, but all its actions and all its rights are dependent on the same law. Can a being, thus constituted, have a case which does not arise literally, as well as substantially, under the law."

One thing is certain, the Kiefer Oil and Gas Company was once a legal entity, incorporated under the laws of the United States—when and under what law did it become any other legal entity? It could only become so by the power of Congress. When and where did Congress exercise the power? Suppose right now a controversy should arise between the Kiefer Oil and Gas Company and the

State of Oklahoma, as to whether or not the Kiefer Oil and Gas Company had certain powers under the laws under which it was incorporated, and it should develop that under the act of Congress known as the Incorporation Act of Arkansas, the Kiefer Oil and Gas Company had a certain right and power, and that under the incorporation laws of the State of Oklahoma, and under the enumerated powers thereof, it had not such right and power. What power would stand? That granted by the act of Congress, or that contained in the enumerated powers of the law of the State of Oklahoma; conceding, but not admitting, that the State of Oklahoma has—which under the law it has not—visitorial powers? There can be but one answer to that question; and a construction of the powers of the Kiefer Oil and Gas Company given it in the act of Congress creating it, would make a "case arising under the laws of the United States" under *Osborn v. Bank,* a case which has stood the test of a century.

The court in the Boyd case attempted to maintain the proposition that the act of Congress of February 18th, 1901, authorizing incorporation in the Indian Territory, was mere local legislation and did not approach the dignity of a law of the United States. Nearly one hundred years ago, the same contention was made to defeat the jurisdiction of this court in the case of *Cohens* v. *Virginia,* 6 Wheat. 264, 5 L. Ed., 257, a case in which was involved an Act of Congress incorporating the inhabitants of the City of Washington, in the District of Columbia. It was contended with great vigor, that the acts of Congress passed for the government of the District of Columbia were mere "local legislation," and did not come within the spirit and purview of the Judiciary Act of 1789, giving to the courts of the Union jurisdiction of "all cases in law and equity arising under this Constitution, the laws of the United States, etc." Justice

MARSHALL, in deciding that contention, and in holding that such acts of Congress were as much "laws of the United States" as any other Acts of Congress, said:

> "Those who contended that acts of Congress made in pursuance of this power do not, like acts made in pursuance of other powers, bind the nation, ought to show some safe and clear rule which shall support this construction, and prove that an act of Congress, clothed in all the forms which attend other legislative acts, and passed in virtue of a power conferred on, and exercised by Congress, and the legislature of the Uuion, is not a law of the United States, and does not bind them."

The conditions which obtained in the Indian Territory, prior to Statehood, were almost identical with those which have always obtained in the District of Columbia.

Both were governed and controlled by Congress.

In both Congress had the sole, exclusive and plenary power of legislation.

In neither were there any local legislatures elected or chosen by residents thereof.

In neither was there any right of representation in Congress.

Congress was authorized by the Constitution to legislate for both.

It would most certainly seem then, that if an Act of Congress, passed in the Constitutional way and manner for the government of the District of Columbia was a "law of the United States" then the act of Congress of February -8th, 1901, authorizing incorporations in the Indian Territory, passed in the same manner and under the same authority, was also "a law of the United States."

The court in the opinion in the Boyd case evidences the same disinclination to assume jurisdiction in that case

as did Chief Justice FULLER in the case of *Union Pacific Ry. Co. v. Harris,* 158 U. S. 326; 39 L. Ed. 1003; where that great jurist aptly said:

> "*It is not for us* to inquire why writs of error to Circuit Courts of Appeals in actions for damages for negligence of railroad corporations should be allowed simply because the corporations are chartered under the laws of the United States in a statute whose object was to relive an over-burdened court since such is the effect of the statute according to its plain language. Nevertheless * * * * as the other fact upon which jurisdiction could be predicated existed, we are obliged to overrule it."

No less a jurist, then, than Chief Justice FULLER as much as said that it is not for the courts to legislate this class of appeals out of existence, but that would be left to Congress in its wisdom.

In this case the defendant Kiefer Oil and Gas Company was joined as a party defendant with several individual citizens of the State of Oklahoma. In the case of *Texas & Pac. Ry. Co.* v. *Eastin & Knox,* 214 U. S. 153; 53 L. Ed. 946; this court held that:

> "An action brought jointly against a corporation chartered under an act of Congress, and a local defendant, upon a joint liability, is a suit arising under the laws of the United States."

And in *In re Dunn,* 212 U. S. 374; 53 L. Ed., 558, where the same conditions existed, it was said:

> "The plaintiffs themselves have made the act of which they complain a joint one, and, being one which arises under the Constitution and laws of the United States, as to one of the defendants, it becomes one as to all. The Federal question permeates the whole case, including the individual defendants, as well as the cor-

poration. The case which plaintiffs make in their petition in the suit must determine the character of the cause of the action."

In this connection it may be said in the words of this court in the case of the *Pittsburg, Cincinnati & St. Louis Ry. Co. v. Ramsey*, 89 U. S., 322; 22 L. Ed., 824:

> "Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction and the court may act judicially upon such admission."

By reference to the answer of the defendant Kiefer Oil and Gas Company (pr. tr. p. 27) it will be seen that it contains the following admission:

> "they admit that the defendant Kiefer Oil and Gas Company *is* a corporation organized under the laws of the United States in force in the Indian Territory."

In the brief in support of the motion to dismiss, appellees in Point Eight attempt to make some point—not clear what point exactly, but some point—of the fact that there is no allegation that the Kiefer Oil and Gas Company is a corporation "*existing*" under and by virtue of the laws of the United States. An inspection of the bill (pr. tr., p. 4) shows that allegation to be,

> "That the defendant Kiefer Oil and Gas Company *is* a corporation duly organized on the 26th day of April, A. D., 1907, *under and by virtue of the laws of the United States in force in Indian Territory.*"

The bill was filed, as shown by the printed transcript (p. 3) on the 3rd day of June, A. D., 1908. The verb "*is*" is of the present tense, and it is difficult to see how it can be contended that it is not alleged that the corporation was "existing" on that day.

Counsel for appellees in their brief present the following statement:

> "It therefore does not clearly appear that, since the admission of Oklahoma as a state, the defendant, Kiefer Oil and Gas Company, has continued to exist and operate and do business as a corporation organized under the laws of the United States in force in the Indian Territory."

Inasmuch as the State of Oklahoma was admitted into the Union on the 16th day of November, 1907, a fact of which this court will take judicial knowledge, and inasmuch as the bill was not filed until the 3rd day of June, A. D., 1908, eight months after the advent of statehood, at which time, as appears from the bill, the defendant Kiefer Oil and Gas Company was a corporation organized under and by virtue of the laws of the United States, it is difficult to find a basis for the statement of counsel.

The fact that the advent of Statehood occurred on the 16th day of November, A. D., 1907, explains the allegation as to the citizenship of the Kiefer Oil and Gas Company, to-wit: that said defendant was a citizen of said Territory up to and including November 16, 1907; and that since that time it has been a citizen of the State of Oklahoma.

The citizenship of the defendant corporation Kiefer Oil and Gas Company, is, of course, immaterial. In *Union Pacific Ry. Co.* v. *Harris*, 158 U. S., 327; 39 L. Ed., 1003, the allegation as to the Union Pacific Railway Company was,

> "the Union Pacific Railway Company, defendant, which was heretofore and now is duly chartered under and by virtue of the laws of the United States, and having its principal place of business in the city of Omaha, and State of Nebraska, and now is and was at the time and times hereinafter mentioned, a citizen of the State of Nebraska."

The jurisdiction in that case was, of course, maintained. As said in *Sup. Lodge K. of P.* v. *England*, 94 Fed., 369, by the Circuit Court of Appeals for the Eighth Circuit:

> "It is not the domicile of a corporation created by Congress that confers jurisdiction upon the Federal Court, but the fact that it has been so created."

That the contention of appellee is more fanciful than real is apparent. Lengthening this brief with only a few illustrations, it will suffice to say that in the late case of *Texas & Pacific* v. *Eastin & Knox*, 214 U. S., 153; 53 L. Ed. 946, a case where the jurisdiction of the court was expressly sustained as one arising under the laws of the United States, the allegation of the original petition was that the Texas and Pacific "is a body corporate, duly incorporated under the Federal statutes with an office and station in the counties of Palo Pinto and Parker, in the State of Texas." The jurisdiction of the court was tested by a motion to dismiss and the jurisdiction was maintained. See also, *Pacific Removal Cases*, 115 U. S. 1; 29 L. Ed., 319, where, in the case of *Union Pacific* v. *City of Kansas*, the same allegation was used.

Counsel also seems to see a difference in the allegation in the case of *Union Pac. Ry. Co.* v. *Harris*, 158 U. S., 327; 39 L. Ed. 1003, that

> "the Union Pacific Railway Company, defendant, which was heretofore and *now is* duly chartered and organized under and by virtue of the laws of the United States,"

from that in the case at bar, to-wit:

> "that the defendant Kiefer Oil and Gas Company *is* a corporation duly organized on the 26th day of April, 1907, under and by virtue of the laws of the United States."

Just what the difference between "now is" and "is" can be, is not clear—and, of course, there is none.

Counsel in his objection to the form of the allegation overlooks the point, as did the Circuit Court for the Eastern District of Oklahoma, that it is the fact that a corporation was *created* under and by virtue of an act of Congress that makes a case to which it is a party a case "arising under the laws of the United States." That that fact is the life of the Federal question has been hereinbefore shown in the discussion of the case of *Osborn* v. *Bank, supra.*

The conclusion is, therefore, irresistible, that the allegation of the bill that the Kiefer Oil and Gas Company is a corporation organized under and by virtue of the laws of the United States, presents a suit arising under the laws of the United States, and that as a result, the jurisdiction of this court is maintained.

POINT THREE

Another Federal question is disclosed in the bill by a *statement of facts* in legal and logical form, such as is required by good pleading.

It is an old established principle that—

> "In suits in equity, as well as in actions at law, if the plaintiff seeks to establish in himself a right to or interest in real property, or seeks to obtain any relief in regard to such property, as the removal of cloud from title, he must, in his bill, make a proper and sufficient averment of his title. In no class of litigation are the common law rules of pleading more closely followed in equity than in bills concerning the title to real property."
>
> Daniell Chancery Pl. & Pr. 466-474.

By an inspection of the bill it will be seen that the right or title set up by the appellant is that existing under and by virtue of an oil and gas mining lease executed by George Franklin Berryhill, the father, upon the lands in controversy (pr. tr. p. 5). From an inspection of the bill it appears:

> "That George Franklin Berryhill was a Creek Indian and a citizen of the Creek Nation, and that his name appeared on the approved rolls of the Creek Nation as a citizen by blood or said nation." (Pr. tr. p. 4.)

By the terms of Section 16 of the act of June 30, 1902 (32 Stat. L., 500),—and it will be remembered it was under Section 7 of the same act that the lands in controversy were granted to George Franklin Berryhill,—it was provided:

> "Lands allotted to citzens shall not in any manner whatsoever * * be alienated by the allottee or his

heirs, before the expiration of five years from the date of the approval of this supplemental agreement, except with the approval of the Secretary of the Interior * * * Any agreement or conveyance of any kind or character violative of any of the provisions of this paragraph, shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

By Section 17 of said act it was provided that:

"leases for mineral purposes may also be made with the approval of the Secretary of the Interior, and not otherwise. Any * * * lease of any kind or character violative of this paragraph shall be absolutely void and not susceptible of ratification in any manner, and no rule of estoppel shall ever prevent the assertion of its invalidity."

It will be remembered also that in pursuance of express authority granted the Secretary of the Interior in Section 17 of the act of June 30, 1902 (32 Stat. 500), hereinbefore referred to, the Secretary of the Interior had promulgated a full set of rules and regulations governing the leasing of lands of allottees for oil and gas mining purposes.

By reference to the bill of appellants (pr. tr. p. 6), it will be seen that these rules and regulations are set out therein in full. It will serve no good purpose to set out these rules and regulations in this brief, and this Court is respectfully referred to the printed record for anaylsis of said rules and regulations.

Suffice it to say, that on March 24th, 1906, the date on which George Franklin Berryhill, the father, executed the oil and gas lease to appellant *no Indian members of the Creek Nation could sell, nor could he lease any of his lands for oil and gas purposes, except with the approval of the Secretary of the Interior, and all oil and gas leases*

on Indian lands at that date must have been executed in exact accordance with the rules and regulations of the Secretary of the Interior—otherwise they would have been absolutely void and not susceptible of ratification in any manner.

Therefore the very effectiveness of the right or title of the appellant was dependent upon these rules and regulations—without them and without compliance with them, the appellant had no right or title which he could assert or enforce. That title or interest which the appellant in this case obtained by reason of the oil and gas mining lease, said lease in terms being "do hereby grant * * * all the oil deposits and natural gas in or under the lands (describing them)," is the particular estate, or, to say the least, an estate in the nature of a particular estate.

And it is a well settled rule of equity pleading that

> "Where a special title is necessary to maintain the action, it must be stated with certainty. * * * And it is a rule that where title is necessary to be shown, if the plaintiff derive a particular estate from another he ought to show that the other had such an interest as would enable him to make the estate. The reason why the commencement of particular estates must be shown in the pleadings is because they are created by agreement out of the primitive estate; and the court must judge whether the primitive estate and agreement be sufficient to produce the particular estate claimed; and this is a fundamental rule which ought not to be broken upon fancied inconveniences."
>
> 1 Tidd's Practice, 393, 394.

> "There is a leading distinction on this subject between estates in fee-simple and particular estates. * * * With reference to particular estates, the general rule is that the commencement of particular estates must be shown. If, therefore, a party sets up in his own favor

an estate tail, an estate for life, or a tenancy at will, he must show the derivation of that title from its commencement; that is from the last seisin in fee; and if derived by alienation or conveyance, the substance and effect of such conveyance should be precisely set forth."

1 Stephens on Pleading (Heard), 303-312.

In pursuance of these well known rules, the appellant has set forth the commencement of his right or title, and has shown by a statement of facts, that his lessor had such an estate as would support the particular estate. It appearing that the lessor George Franklin Berryhill was an Indian, to show his right under the lease, appellant must state the facts showing full compliance with the law of Congress; that is the rules and regulations of the Secretary of the Interior made in pursuance of express statutory authority of Congress *(U. S.* v. *Eaton; Caha* v. *U. S.; U. S.* v. *Bailey;* —all hereinbefore referred to.)

These facts show a Federal question involved: Did the appellant in all respects comply with the rules and regulations of the Secretary? This involves a construction of those rules and regulations, and if from such construction it is said as a matter of law he did not, the right of the appellant is defeated.

It matters not that the defendants may set up a defense in their answer not involving the construction of the rules and regulations—the law of the United States. The answer or plea does not determine the jurisdiction of this court.

Metcalf v. *Watertown,* 128 U. S. 586; 32 L. Ed. 543;
Colorado Consol. Mining Co. v. *Turck,* 150 U. S., 139; 37 L. Ed. 1030;

but it is the statement of facts in the original bill in the Circuit Court.

Devine v. *Los Angeles,* 202 U. S. 313; 50 L. Ed. 1046;

Bankers Mutual Casualty Co. v. *Minneapolis,* 192 U. S. 372; 48 L Ed. 484; and other cases hereinbefore cited.

As said by Chief Justice MARSHALL in *Osborn* v. *Bank,* 9 Wheat. 824; 6 L. Ed. 224:

> "The next question is, has this being a right to make this particular contract. If this question is decided in the negative, the cause is determined against the plaintiff; and this question, too, depends entirely on a law of the United States * * * whether it be in fact relied on or not, in the defense, it is still a part of the cause and may be relied on. The right of the plaintiff to sue cannot depend on the defense which the defendant may choose to set up. * * * *The questions which the case involves, then, must determine its character, whether those questions be made in the cause or not.*"

This court in the case of *State of Tennessee* v. *Union and Planter's Bank,* 152 U. S., 454; 38 L. Ed. 511, quoted the last sentence of the above quotation with approval and said "In this last clause, as the context shows, the word 'then' (though printed between commas) means 'at that time,' that is to say 'when the action is brought'."

Inasmuch, therefore, as it appears from the face of the bill that the very life of the effectiveness of the right set up by the appellant in his bill is given it by the rules and regulations of the Secretary of the Interior—laws of the United States—this suit is one arising under the law of the United States, and consequently the jurisdiction of this court attaches.

In Answer to Point Five of Appellees' Brief in Support of the Motion to Dismiss.

It is a proposition too well established to admit of argument that where the original jurisdiction of the Circuit Court is invoked, that jurisdiction must appear upon the face of the bill by a *statement of facts.*

Devine v. *Los Angeles,* 202 U. S., 313; 50 L. Ed. 1046;

Bankers Mutual Casuality Co. v. *Minneapolis,* 192 U. S., 372; 48 L. Ed. 484;

Northern Pac. Ry. Co. v. *Soderberg,* 188 U. S., 526; 47 L. Ed. 575;

Houard v. *U. S.,* 184 U. S., 676; 46 L. Ed. 754;

Florida Central & P. R. R. Co. v. *Bell,* 176 U. S. 321; 44 L. Ed. 486;

Sonnentheil v. *Christian M. Brew. Co.,* 172 U. S. 401; 43 L. Ed. 492;

Colorado Consol. v. *Turck,* 150 U. S., 139; 37 L. Ed. 1030.

It is another proposition too well settled by this court to admit of further argument that when the jurisdiction of the Circuit Court is so made to appear, the Circuit Court has jurisdiction over the whole case and over all questions of law and fact arising in such case. This has been the rule ever since the case of *Osborn* v. *The Bank of United States,* 9 Wheat, 823; 6 L. Ed., 224, to the present day. In that case, Chief Justice MARSHALL said:

> "We think, then, that when a question to which the judicial power of the Union is extended by the Constitution, forms an ingredient of the original cause, it is in the power of Congress to give the circuit courts jurisdiction of that cause, although other questions of fact may be involved in it."

And in another portion of the opinion, he said:

> "We ask, then, if it can be sufficient to exclude this

jurisdiction, that the case involves questions depending on general principles? A cause may depend on several questions of fact and law. Some of these may depend on a construction of the law of the United States; others on principles unconnected with that law. If it be a sufficient foundation for jurisdiction, that the title or right set up by the party may be defeated by one construction of the Constitution or law of the United States, and sustained by the opposite construction, provided the facts necessary to support the action be made out, then all the other questions must be decided as incidental to this, which gives that jurisdiction. Under this construction, the judicial power of the Union extends effectively and beneficially to that most important class of cases, which depend on the character of the cause. On the opposite construction, the judicial power never can be extended to a whole case, as expressed by the Constitution, but to those parts of cases only which present the particular question involving the construction of the constitution or the law. We say it never can be extended to the whole case, because, if the circumstance that other points are involved in it, shall disable Congress from authorizing the courts of the Union to take jurisdiction of the original cause, it equally disables Congress from authorizing those courts to take jurisdiction of the whole cause, on an appeal, and thus will be restricted to a single question in that cause; and words obviously intended to secure to those who claim rights under the constitution, laws, or treaties of the United States, a trial in the federal courts, will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal."

This doctrine has been sustained by an unbroken line of decisions since the case of *Osborn* v. *Bank*, and remains the doctrine to this day.

State of Tennessee v. *Davis*, 100 U. S., 257; 25 L. Ed. 648.

In *New Orleans, Mobile & Texas R. R. Co.*, v. *State of Mississippi*, 102 U. S. 144, 26 L. Ed. 98, Justice HARLAN, speaking for this Court, said:

> "That except in the cases of which this court is given, by the Constitution, original jurisdiction, the judicial power of the United States is to be exercised in its original or appellate form, or both, as the wisdom of Congress may direct; and lastly:
>
> "That it is not sufficient to exclude the judicial power of the United States from a particular case, that it involves questions which do not at all depend on the Constitution or laws of the United States; but when *a* question to which the judicial power of the Union is extended by the Constitution forms an ingredient of the original cause, it is within the power of Congress to give the Circuit Courts jurisdiction of that cause, although other questions of fact or of law may be involved in it.
>
> "These propositions are now too firmly established to admit of or to require further discussion."

Upon this appeal from the Circuit Court of Appeals for the Eighth Circuit the jurisdiction of this court is dependent entirely upon the jurisdiction of the Circuit Court for the Eastern District of Oklahoma as it appeared *in the original bill* of complaint in that court from a statement of the facts therein. If from that statement of facts in the bill the Circuit Court for the Eastern District of Oklahoma had jurisdiction, it had jurisdiction to try the whole case and every question of law and fact in it, and likewise has this court the same jurisdiction, otherwise as stated by Chief Justice MARSHALL in *Osborn* v. *Bank, supra:*

> "A trial in the federal courts will be restricted to the insecure remedy of an appeal upon an insulated point, after it has received that shape which may be given to it by another tribunal."

Section 6 of the Act of March 3, 1891 (26 Stat. L., 828) provides that the judgment or decree of the Circuit Court of Appeals shall be final "in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizen of different states. * * * In all other cases (excepting enumerated ones in said section not applicable to this case) there shall be of right an appeal or writ of error or review of the case by the Supreme Court of the United States."

So it appears that the jurisdiction of this court is dependent solely upon the question: Was the original jurisdiction of the Circuit Court dependent entirely upon the opposite parties to the suit being citizens of different states? If not, then the right of appeal to this court exists.

That this is the sole test has been repeatedly recognized by this court in numerous cases.

In the case of *Northern Pac. Ry. Co. v. Soderberg*, 188 U. S., 526, 47 L. Ed., 575, this court said:

> "Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the Circuit Court was invoked upon the ground of diverse citizenship, the decree of the Circuit Court of Appeals is final. *But, to impress the attribute of finality upon a judgment of the Circuit Court of Appeals, it must appear that the original jurisdiction of the Circuit Court was dependent 'entirely' upon diverse citizenship.* That is not the case here. Plaintiff's bill does, indeed, set up a diversity of citizenship as one ground of jurisdiction, but, as it appears that its title rests upon a proper interpretation of the land grant act of 1864 as to the exception of non-mineral lands, there is another ground wholly independent of citizenship. * * * * If the case made by the plaintiff be one which depends upon the proper construction of an act of Congress, with

the contingency of being sustained by one construction and defeated by another it is one arising under the laws of the United States. Under the allegations of the bill, the fact that the land department had not determined whether the land in question was mineral or non-mineral does not involve a question of fact, as the facts are admitted; but solely a question of law whether land valuable for its granite is mineral or non-mineral under the terms of the grant."

So also in *Howard* v. *United States*, 184 U. S., 680; 46 L. Ed., 757, the court said:

"The first question is one of the jurisdiction of this court. The defendant in error insists that the judgment of the Circuit Court of Appeals was final.

"Is this a correct interpretation of the statutes defining and regulating the jurisdiction of the courts of the United States? Among the cases in which the judgments or decrees of the Circuit Courts of Appeals are made final are those in which the jurisdiction of the Circuit Court 'is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States.'

"But does it not appear *from the petition* itself that the case was one of which the Circuit Court could take cognizance independently of the citizenship of the real parties in interest? This question must receive an affirmative answer. The suit was directly upon a bond taken by the Circuit Court in conformity with the statutes of the United States, and the case depends upon the scope and effect of the bond and the meaning of those statutes. It was, therefore, a suit arising under the laws of the United States, of which the Circuit Court was entitled to take original cognizance, even if the parties had been citizens of the same state.

"It results, therefore, although the petition shows a case of diverse citizenship, jurisdiction was not de-

pendent entirely upon such citizenship. Jurisdiction was likewise invoked and rightfully, upon Federal grounds." To same effect:

Sonnentheil v. *Christian M. Brew Co.*, 172 U. S., 401; 53 L. Ed., 493x.

The case of *Third Street & Suburban Railway Co.* v. *Lewis*, 173 U. S., 460; 43 L. Ed., 767, is an appeal from the Circuit Court of Appeals for the Ninth Circuit, and the court tested its jurisdiction in the following manner:

"If it does not appear at the outset that the suit is one of which the Circuit Court at the time its jurisdiction is invoked could properly take cognizance, the suit must be dismissed."

And in *Bankers Casualty Company* v. *Minneapolis*, 192 U. S., 380; 48 L. Ed., 488:

"If the jurisdiction of the Circuit Court depended entirely on diversity of citizenship, the judgment of the Circuit Court of Appeals was made final and the cause must be dismissed."

In *Florida Central & Peninsula R. R. Co.* v. *Bell*, 176 U. S. 325; 44 L. Ed. 489, was said:

"In order to maintain our jurisdiction, it must appear that the jurisdiction of the circuit court was not dependent solely upon the opposite parties being citizens of different states. * * * *This question must be ensweered from an inspection of the declaration of the plaintiffs in the circuit court.* Does it disclose that the plaintiff invoked the jurisdiction of that court because the parties were citizens of different states, or because the case was alleged to be one arising under the constitution, laws or treaties of the United States?"

In *Colorado Consolidated Mining Co.* v. *Turck*, 150 U. S. Rep. 142; 37 L. Ed. 1031, Mr. Chief Justice FULLER said:

> "If the judgment of the Circuit Court of Appeals for the Eighth Circuit was final, under the section in question, then this writ of error must be dismissed. And in order to maintain that the decision of the Circuit Court of Appeals was not final, it must appear that the jurisdiction of the Circuit Court was not dependent entirely upon the opposite parties being citizens of different states."

Cases could be multiplied in which this is declared to be the test, and the only test, of the jurisdiction of this court, but it would be to no purpose. The test laid down by this court to be the test excludes all other tests.

This court, under its decisions, will not examine the opinion of either the Circuit Court for the Eastern District of Oklahoma, or the Circuit Court of Appeals to determine the rationale of the decision in either court. If the jurisdiction of this court depended upon the result of the investigation as to whether or not the Circuit Court of Appeals decided a Federal question, either adversely to or in accordance with the contention of the parties and determined its jurisdiction accordingly, what would have become of the cases of *Northern Pacific Ry. Co.* v. *Amato*, 144 U. S. 465; 36 L. Ed. 506, in error to the Circuit Court of Appeals for the Second Circuit, or that of *Union Pacific* v. *Harris*, 158 U. S., 326; 39 L. Ed., 1003, in error to the Circuit Court of Appeals for the 8th Circuit, the syllabus of which latter is:

> "In an action for damages for negligence of a railroad corporation, a judgment of the circuit court of appeals is not final, if the jurisdiction depended not merely on diverse citizenship, but also upon the fact that the defendant was a Federal corporation,"

or the case of *Texas & Pacific Ry. Co.* v. *Gentry*, 163 U. S., 353; 41 L. Ed., 186, in error to the Circuit Court of Appeals for the Fifth Circuit; or the case of *Texas & Pacific*

Ry. Co. v. *Cody,* 166 U. S., 606; 41 L. Ed., 1132, in error to the same court? These cases were all personal injury suits, and in all of these cases the decisions of the Circuit Court of Appeals turned upon the mere question of general principles of law—was or was not one of the parties guilty of common law negligence? In the Kalinski case (163 U. S. 289; 41 L. Ed., 163), in error to the Circuit Court of Appeals for the Fifth Circuit, the turning point of the decision in the Court of Appeals was whether or not Kalinski was entitled to receive a sum of money due upon an insurance certificate.

In all of those cases the Federal question as to the power to sue or to be sued in the Federal Courts under the Acts of Congress authorizing incorporation, though not expressly, was impliedly determined in favor of the party asserting the right to thus sue or be sued, and thus was the only Federal question in those cases disposed of in favor of the appellants.

This Court in all those cases maintained its jurisdiction irrespective of the question whether the decision in the Circuit Court of Appeals determined a Federal question in favor or against one or the other of the parties; and the test announced by this Court, "was the jurisdiction of the Circuit Court originally invoked upon grounds other than diversity of citizenship by a statement of facts set forth in the complaint," was announced as the only test, and by that test this Court has jurisdiction of this case.

What has been here said, effectually disposes, we think, of the objection to the jurisdiction of this Court as expressed by counsel for appellees in their brief, under "Point Five."

However, as a matter of fact, the Circuit Court of Appeals, in its opinion in this case, decided two distinct Federal questions against the claim of the appellant in constru-

ing two separate and distinct Acts of Congress, by the construction of either of which "the right or title asserted by the appellant might be defeated or sustained."

And that was done in this way:

By Section 16 of the Act of Congress of June 30th, 1902 (32 Stat. L., 500), hereinbefore set out, it was provided that,

> "Lands allotted to citizens shall not * * * be alienated by the allottee or his heirs, before the expiration of five years from the date of the approval of this Act. * * * Any agreement or conveyance of any kind or character shall be absolutely void. * * *"

It thus appears that George Franklin Berryhill, being a citizen, as hereinbefore shown, was incapable of alienating the lands granted to him by the United States under and by virtue of Section 7 of the Act of June 30, 1902 (32 Stat. L., 500), at the time he sold the fee in them to the appellees, McKays, grantors of the Kiefer Oil and Gas Company, that is, on the 5th day of June, A. D., 1906 (see printed transcript, p. 32), unless the restrictions against alienation on said lands were removed by virtue of the Act of Congress approved April 26, 1906 (36 Stat. L., 145), which provides in Section 22 thereof:

> "That the adult *heirs* of any deceased Indian of either of the Five Civilized Tribes whose selection has been made, or to whom a deed or patent has been issued for his or her share of the land of the tribe to which he or she belongs or belonged, *may sell and convey the lands inherited from such decedent.*"

It was the contention of appellant, as hereinbefore set out, that, inasmuch as Andrew J. Berryhill, the child, died in November, 1901, without any right to an allotment in the Creek Nation, and inasmuch as his name was placed on the

rolls after his death, and by virtue of a right which accrued after his death; and inasmuch as in October, 1904, three years after the death of said Andrew J. Berryhill, a deed was executed wherein the lands in controversy were granted to the "Heirs of Andrew J. Berryhill;" that the lands granted to the "heirs" under Section 7 of the Act of June 30, 1902 (32 Stat. L., 500), did not come to George Franklin Berryhill, the father, by descent, but by grant or purchase; that therefore he did not inherit the lands in controversy, and that therefore the lands in controversy could not be deemed to be "lands inherited from such decedent," within the purview of Section 22 of the Act of April 26, 1906 (36 Stat. L., 145); in which event, the conveyance to the McKays, the grantors of the Kiefer Oil and Gas Company, was null and void under the provisions of the Act of June 30, 1902 (32 Stat. L., 500), and the oil and gas lease of the appellant being duly approved by the Secretary of the Interior, and duly recorded under the provisions of Section 20 of the Act of April 26, 1906 (34 Stat. L., 137), was a valid oil and gas lease as against the rights of all. But the Circuit Court of Appeals held that, by virtue of the phrase "shall descend," used in Section 7 of the Act of June 30, 1902 (32 Stat. L., 500), the granting Act, that the land should be treated as "inherited lands," and that, therefore, the conveyance of the fee in said lands to the McKays, the grantors of the Kiefer Oil and Gas Company, by George Franklin Berryhill, on June 5th, 1906, was not void under the provisions of Section 16 of the Act of June 30, 1902 (32 Stat. L., 500). And thus was the right and title asserted by the complainant in his bill defeated by a construction of the "laws of the United States."

The construction of the other Act of Congress, by which the right or title of complainant, as stated in his bill, might either be defeated or sustained, arose in this way. On January 21, 1903, under and by virtue of the ex-

press authority granted in the Act of June 30, 1902 (32 Stat. L., 500), the Secretary of the Interior promulgated certain rules and regulations governing the leasing of lands in the Creek Nation for oil and gas purposes. These rules and regulations were set out in the bill (printed transcript, p. 5). These rules and regulations, with slight changes, were in effect on March 24, 1906, when the lease from George Franklin Berryhill to the appellant was executed.

Sections 5 and 16 of said rules and regulations were as follows:

> "*Sec. 5.* No lease will be approved for a greater term of years than as follows: Three years for grazing purposes, ten years for agricultural purposes, and fifteen years for mineral purposes. All leases must be in quadruplicate and be executed in the presence of two subscribing witnesses, one part to be filed in the office of the Commissioner of Indian Affairs, one with the Agent, Union Agency, one to be delivered to the lessee, and one to the lessor.
>
> "*Sec. 16.* * * * All leases which require the approval of the Secretary of the Interior, must be submitted to the Indian Agent, Union Agency, for transmittal within 30 days from and after the date of the execution of the lease, and all leases which have been heretofore executed must be submitted to said agent within 30 days from the date of the approval of this amendment. No lease presented after the time herein designated will be received by the agent, or transmitted to the Department, or regarded as having any effect whatever."

By Act of Congress of February 19th, 1903 (32 Stat. L., 841), an Act entitled, "An Act Providing for the Record of Deeds and Other Conveyances and Instruments of Writing in Indian Territory, and for Other Purposes," and known as the "Recording Act," was put in force in the

Indian Territory. Said Act, as far as material to this case, provided:

> "That Chapter twenty-seven of the Digest of the Statutes of Arkansas, known as Mansfield's Digest, 1884, is hereby enacted in the Indian Territory, *so far as the same may be applicable and not inconsistent with any law of Congress.*"

The said Chapter twenty-seven, of course, contained the usual provision that no deed for the conveyance of any real estate should be valid as against a subsequent purchaser without notice thereof, unless recorded.

It appears that the oil and gas mining lease of appellant, executed and approved in accordance with the rules and regulations of the Secretary of the Interior aforesaid, was filed in the office of the United States Indian Agent, in accordance with Section 5 of the rules and regulations of the Department of the Interior, on April 21, 1906, and was approved by the Secretary of the Interior on April 19, 1907 (pr. tr., p. 5), and was, on the 18th day of May, 1907 (pr. tr., p. 6), filed in the office of the Recorder of the proper district under the provisions of the Act of Congress approved *April 26, 1906* (34 Stat. L., 147). It further appears that the conveyance to the McKays, the grantors of the Kiefer Oil and Gas Company, was executed June 5, 1906, and recorded under the provisions of the Act of *February 19, 1903* (32 Stat. L., 841), (pr. tr., p. 32).

It will thus be seen that the deed from George Franklin Berryhill to the McKays, the grantors of the Kiefer Oil and Gas Company, was recorded prior to the recording of the oil and gas mining lease from the same grantor to the appellant on the same lands. But, being recorded on June 5, 1906, it was recorded while the oil and gas mining lease was on file with the Indian Agent in accordance with the rules and regulations of the Secretary of the Interior.

(Lease filed April 21, 1906; approved by the Secretary of the Interior on the 18th day of May, 1907.)

It was the contention of the appellant that, inasmuch as the rules and regulations of the Secretary of the Interior, prescribed by express authority of Congress, had the force and effect of law (*U. S.* v. *Eaton*, 144 U. S. 677; 36 L. Ed., 591; *Caha* v. *U. S.*, 152 U. S. 222; *U. S.* v. *Bailey*, 9 Peters, 253), at the time of the passage of the Act of Congress of February 19, 1903 (32 Stat. L., 841), and were in force and effect at that time; and that inasmuch as Section 5 of those regulations required the filing of appellant's oil and gas mining lease in the respective Indian Offices; and that inasmuch as it was impossible to comply with both laws; that the provisions of the Act of February 19, 1903 (32 Stat. L., 814), known as the "Recording Act," were not applicable and were inconsistent with the prior law of Congress—the rules and regulations of the Secretary of the Inetrior—and did not, therefore, apply to mineral leases covering lands from which the restrictions against alienation had not been removed, and that such leases executed in accordance with the rules and regulations were not within the purview of that Act.

It was the contention of appellant, therefore, that the provisions of the Act of February 19, 1903 (32 Stat. L., 814), did not apply to appellant's lease; that not being subject thereto, the oil and gas mining lease to appellant being prior in time to the conveyance to the McKays, the grantors of the Keifer Oil and Gas Company, it was prior in right. (See opinion Circuit Court of Appeals, pr. tr., p. 296.)

But the Circuit Court of Appeals held that the Act of Congress of February 19, 1903 (32 Stat. L., 841), known as the "Recording Act," did apply to the lease of appellant, and that inasmuch as said lease had not been recorded

prior to the conveyance to the McKays, the grantors of the Kiefer Oil and Gas Company, it was void as against them.

And thus was the right or title asserted by the appellant again defeated by a construction of a "law of the United States," when another construction would have sustained it.

The case of *Empire State Idaho M. & D. Co.* v. *Hanley*, 198 U. S., 293; 49 L. Ed., 1057, referred to by counsel for appellees, was an appeal from the Circuit Court of Appeals for the Ninth Circuit, and was dismissed by this Court for the reason that it did not stand the jurisdictional test prescribed by the Court and heretofore set out and discussed, to-wit: Was the original jurisdiction of the Circuit Court dependent entirely upon the opposite parties to the suit being citizens of different States? The language of Chief Justice FULLER, in the opning sentence of his opinion, is:

> "We are of the opinion that the jurisdiction of the Circuit Court was dependent entirely upon diversity of citizenship, and the appeal must be dismissed."

Chief Justice FULLER, it is true, said "The *decisions* of the courts below did not turn on *any* Federal question." Therein is the case at bar vitally different from that case. *The decisions of the courts below in the case at bar, in each instance, did turn on not only one, but several Federal questions.*

Another vital distinction is, that appellant, in the *Hanley* case, came to this Court upon a decree virtually in its favor, while in the case at bar, the appellant comes to this court with a decree against it in every particular—a decree for the dismissal of his bill. Therefore, the appellant in this case does not make a grievance of his success, for he has none.

The case of *Anglo-American Provision Co.* v. *Davis*

Provision Co., 191 U. S., 373; 48 L. Ed., 225, does not in any manner touch the question under which counsel has cited it. It is not in any manner in point.

The case of *Lampasas* v. *Bell*, 180 U. S. 276; 45 L. Ed., 527, holds merely that "the objection of Constitutionality of a statute must be made by one having the right to make it, not by a stranger to its grievance." It affects this case in no way.

The case at bar has nothing but Federal questions in it.

The jurisdiction of this Court is maintained.

In Answer to Point One of Appellees' Brief in Support of the Motion to Dismiss.

Appellee's point is stated as follows:

> "If the plaintiff could state his case logically and in the form of good pleading, without disclosing a Federal question, then the fact that it may appear from the bill that a Federal question may arise does not, however, confer upon the Circuit Court of the United States jurisdiction."

Appellant respectfully says to this Court, that such doctrine is both novel and startling. An examination of the cases demonstrates that no such doctrine has ever been laid down by this or any other court, and it is fair to assume that it never will be.

The only case that we have been able to find where such a doctrine was contended for, is the case of *Mastin* v. *Chicago, R. I. & P.*, 123 Fed., 827, where a similar contention was disposed of by Judge PHILLIPS in the following words:

> "On the argument of this motion (to dismiss for want of jurisdiction) at the hearing, counsel for plain-

> tiffs suggested that the allegations respecting the provisions and violations of the Act of Congress and the regulations made thereunder, might be entirely eliminated from the petition, yet leave enough to show a right of action. *A sufficient answer to this would be that the character of the petition, and the cause of action that may be supported by evidence on the trial, is to be determined from the face of the petition as it was when the cause was removed.*"

That the rule announced by counsel for appellee is not the correct rule, is evidenced by the decisions of this Court.

In the case of *Oregon Short Line and U. N. Ry. Co.* v. *Skottowe,* 162 U. S., 490; 40 L. Ed., 1048, the complaint described the defendant as "a corporation, existing and doing business in the State of Oregon." After referring to cases holding that, where it appears from the complaint that a corporation is one organized under the laws of the United States, a Federal question appears, this Court held that, inasmuch as the allegation that the defendant was a corporation so organized, did not appear from the bill, no Federal question was presented in such bill. The Court held inferentially that had such organization appeared in the bill, a Federal question would have appeared. The Court then demonstrated that the complaint, as presented, was sufficient, without the allegation of the Federal character to sustain proof making out a cause of action, and proceeded thus:

> "Suppose the complaint in the present case to have been traversed by a plea of the general issue, would it have been necessary for the plaintiff to prove any other facts than those alleged? * * * To justify a recovery in such a case, it would not be necessary for the plaintiff to allege or to prove the extent and nature of the defendant's corporate powers."

The case was held to be within the rule that the Federal question or the Federal character of the defendant company must appear from the bill, and this Court dismissed the cause.

If, as contended by counsel for appellees, the rule was that if the plaintiff could state his case without disclosing a Federal question in the bill, no such question could arise, then this Court has erroneously accepted jurisdiction of that line of cases, including, among others referred to under the discussion of Point Two in this brief, the following:

Sup. Lodge K. of P. v. *Kalinski,* 163 U. S., 289; 41 L. Ed., 163;

Butler v. *National Home,* 145 U. S., 64; 36 L. Ed., 349;

Northern Pacific v. *Amato,* 144 U. S., 645; 36 L. Ed., 506;

Pacific Removal Cases, 115 U. S., 1; 29 L. Ed., 319;

Northern Pacific v. *Soderberg,* 188 U. S., 526; 47 L. Ed., 575;

for in none of those cases was the Federal incorporation or the Federal character of the parties necessary to a statement of the mere cause of action, as has been seen by the discussion of *Oregon Short Line, etc.,* v. *Skottowe, supra.*

But, of course, this Court rightfully took jurisdiction of those cases, because the Federal incorporation, or Federal character, of one of the parties appeared by "a statement of facts in legal and logical form, such as is required by good pleading, from the plaintiff's statement of his own claim."

Counsel for appellees has no doubt sought consolation in the case of *Joy* v. *St. Louis,* 201 U. S., 332; 50 L. Ed., 771, hereinbefore referred to, and will no doubt refer to

such case either in reply brief or argument. That case arose as follows:

About the beginning of the 18th century, one Louis La Beaume was granted certain lands lying near the village of St. Louis, and now within the city of St. Louis, and fronting on the Mississippi River. This grant was confirmed to the said Louis La Beaume and his heirs and assigns by various and sundry Acts of Congress, enacted subsequent to the original grant. At the time of the institution of that suit, title to a part of the lands originally granted to La Beaume was held by plaintiff, Joy. The title or possession of none of the lands of the original grant was in dispute. It appears, however, that adjoining this tract of land, and in the former bed of the Mississippi River, lands had been formed by accretion, and this land had been taken, and possession thereof had by the City of St. Louis, for many years. The suit was brought for the purpose of recovering possession of this land formed by accretion.

The late Mr. Justice PECKHAM, speaking for this Court, held only that the mere fact that a title is alleged to have from the United States by patent, does not raise a Federal question where the averments show that the question really at issue is the plaintiff's right to land formed by accretion to the land so conveyed. He further held, *in connection with the facts in that case*, that

> "to say that there is a dispute between the parties as to the construction of the several Acts of Congress referred to, does not raise a Federal question, because a statement that there is such dispute is entirely unnecessary in averring or proving plaintiff's cause of action."

Justice PECKHAM also held that a "claim that the title comes from the United States, does not, *for that reason*

merely [italics ours], raise a Federal question;" but he also held:

> "In those cases where the dispute necessarily appears in the course of properly alleging and proving the plaintiff's cause of action, the situation is entirely different. In this case, the real dispute, as stated by the plaintiff, is whether plaintiff is entitled to the land formed by accretion, which has taken place many years since the patent was issued and since the Acts of Congress were passed. There is no dispute as to the terms of the patent, or of the Acts of Congress. The language of the averment in the petition (which is set out in full in the foregoing statement of facts), shows that the controversy in dispute is not at all in regard to the land covered by the letters patent, or by the Acts of Congress, and no dispute is alleged to exist as to such land, but the dispute relates to land, 'which land is a portion of the land formed by accretions, or gradual deposits from said river, along said west bank thereof, between said north and south lines of said outlot, confirmation, and surveys, and which thereby became a portion of the land granted by said letters patent and Acts of Congress approved June 13th, 1812, and June 6th, 1874, respectively.'
>
> "Now, whether the land contained in the original patent reached to the Mississippi River as its eastern boundary, under the distances called for by the patent, would be a question of fact, as was stated in *Swearingen* v. *St. Louis,* 185 U. S., 38; 46 L. Ed., 795; 22 S. C. R., 569, and whether the plaintiff is, upon the facts set forth, entitled to the accretion, is a question of local or state law, and is not one of a Federal nature."

The case at bar is materially different from the *Joy* case, because here there is not only a dispute as to the terms of Section 7 of the Act of June 30, 1902 (32 Stat. L., 500), under which the grant in this case was made, but also as to the very terms of the patent in which the grant is

made, the dispute being as to who the grantees, described as the "heirs of Andrew J. Berryhill," are. In the *Joy* case, the language of the petition showed that the only dispute there related entirely to land formed by accretion *to* land granted by patent, and not at all in regard to land covered by the patent. The Court, therefore, held that the question presented by the facts was merely a local or state question, and not a Federal question. Its language is:

> "As the land in controversy is not the land described in the letters patent, or the Acts of Congress, but, as is stated in the petition, is formed by accretion or gradual deposits from the river, whether such land belongs to the plaintiff is, under the cases just cited, a matter of local or state law, and not one arising under the laws of the United States."

The language of Justice PECKHAM is easily misleading, unless confined strictly to the facts of the case to which it is applied.

The *Joy* case is not authority for the statement that "if the plaintiff could state his case logically and in the form of good pleading, without disclosing a Federal question, then the fact that it may appear from the bill that a Federal question may arise, does not, however, confer upon the Circuit Court of the United States jurisdiction."

On the other hand, many cases of this Court show such not to be the law. We will cite only a few of the many, and attempt succintly to review them.

The case of *McGilvra* v. *Ross*, 215 U. S., 70; 54 L. Ed., 95, hereinbefore referred to, was upon appeal from the Circuit Court of Appeals for the Ninth District, and was decided by this Court on November 15, 1909, about three years subsequent to the decision in the *Joy* case. In that case, complainant asserted title by virtue of the patents from the United States to certain lands, and the question presented

was, whether rights below high-water mark passed to the patentees as appurtenant to the uplands conveyed to them, or whether they vested in the State of Washington after its admission into the Union.

The patents were set up in the petition, and, in addition thereto, it was further alleged that, by virtue of the patents and the Acts of Congress under which they were issued, ownership of the lands in controversy became vested in the patentees and their successors. Justice McKenna, speaking for the Court, after saying that the appellants relied upon the existence of Federal questions to sustain the jurisdiction of the Court, said:

> "These questions are asserted to be * * *:
>
> "'*(1.)* The validity and effect of the several patents of the United States in respect to the claim of ownership thereunder, as set forth in the bill of complaint:
>
> "'*(2.)* The invocation of the protection of the 14th Amendment of the Federal Constitution by these plaintiffs against the threatened taking of their property' by 'the several Acts of the Legislature of the State of Washington and the procedure directed thereunder.'
>
> "It is manifest that the first is the primary question. If the appellants did not derive the rights contended for by the patent, they have no right to be impaired, even assuming, as we have assumed in this discussion, that the action of the State has proceeded far enough to be a trespass upon or an impairment of them. *But whether such rights passed involves the construction of the Acts of Congress under which the patents issued, and, necessarily, of the effect of the patents, and presents a Federal question, if prior decisions have not defined such rights and removed them from controversy.*"

It will, therefore, be seen that this Court held in the *McGilvra* case that a Federal question was presented by the detailed statement of facts setting out the patents, and held that the jurisdiction of this Court was maintained, unless prior decisions had defined such Federal questions and had removed them from controversy.

The appellants in the *McGilvra* case could very well have set out a cause of action by asserting their title to the land in controversy by the statement that they "were the owners of the premises described, and entitled to the possession thereof, and that defendant wrongfully withheld such possesion to their damage," and that statement would not have presented a Federal question. According to the contention of counsel for appellees, in the case at bar, this Court was in error in holding in the *McGilvra* case that a Federal question was presented, because a statement of the title in that case did not necessarily require the setting out of the patent in that case; but, of course, this Court was not in error in maintaining jurisdiction of the *McGilvra* cause, because, as a matter of fact, a Federal question appeared in the petition by statement of the plaintiff's own cause in legal and logical form, such as is required by good pleading.

The case of *Spokane Falls & N. Ry Co.* v. *Ziegler*, 167 U. S. 65; 42 L. Ed., 79, was one of which this Court expressly retained jurisdiction. It would also have been possible for the plaintiffs to have stated a cause of action without stating a Federal question, by merely stating that "he was the owner of, and entitled to the possession of" the lands in controversy; but he did not. On the contrary, he set up facts in legal and logical form, showing a Federal question, whereupon this Court retained jurisdiction.

The same is true of *Hall* v. *Russell*, 101 U. S., 503; 25 L. Ed., 829, and of the case of *Northern Pacific Ry. Co.* v.

Soderberg, 188 U. S. 526; 47 L. Ed., 575, the syllabus of which latter is as follows:

> "A suit over the ownership of real property, in which plaintiff's title rests upon a proper interpretation of the exception of mineral lands in the Northern Pacific Land Grant Act of July 2, 1864 (13 Stat. L., 365), is one arising under the laws of the United States."

Many other cases of this Court could be referred to in which the title to real estate was concerned, and of which this Court retained jurisdiction, but to no purpose.

This Court in the case of *Gage* v. *Kaufman,* 133 U. S. 473; 33 L. Ed., 726, overruled a demurrer to a bill alleging title in general terms, saying:

> "The allegation that the plaintiff is seized in fee simple, is a sufficient allegation that he has the possession as well as the title."

In the case just discussed, and in many others similar thereto, of which this Court took jurisdiction, the general allegation of the case of *Gage* v. *Kaufman* would have been sufficient to maintain the bill, and no Federal question could have arisen therefrom—but this Court retained jurisdiction because additional facts stated in legal and logical order were set out which showed a Federal question.

This Court has, therefore, denied the rule asserted by counsel for appellees, and justly so; for were it the rule, no suit involving the title to real estate could ever be brought in the Circuit Court originally.

The appellant in this case had the right to choose the forum, provided the facts warranted a choice in the matter. If the facts warrant him in seeking the aid of the Federal Courts, he has the right in addition to stating such

matters as may be required to show his right or title generally, to state those facts which show to the Court that a Federal question is necessarily involved. The allegations showing a Federal question are as necessary for the jurisdiction of this Court as are the allegations of ownership and right of possession.

Nothing in the cases cited by counsel for appellees under Part One in any way militate against what has been here said.

With Reference to Point Three of Appellees' Brief.

We agree fully with the doctrine of this Court in the case of *Hanford* v. *Davis*, 163 U. S., 273; 41 L. Ed., 157, wherein it is said:

> "We are not required to say that it is essential to the maintenance of the jurisdiction of the Circuit Court of such a suit that the pleadings should refer in words to the particular clause of the Constitution relied on to sustain the claim of immunity in question, but only that the *essential facts* averred must show not only by reference or argumentatively, but clearly and distinctly, that the suit is one of which the Circuit Court is entitled to take cognizance."

What is there said, is merely in recognition of what was said in *Brown* v. *Keene*, 8 Peters, 115; 8 L. Ed., 885:

> "The decisions of this Court require that the averment of jurisdiction shall be positive, that the declaration shall state expressly the facts on which jurisdiction depends."

Appellant contends, as has hereinbefore been shown, that the bill does clearly and distinctly state *the facts* expressly on which the jurisdiction of this case depends, and that neither argument nor inference must be resorted to to

present the essential facts upon which this jurisdiction depends.

In Conclusion

The conclusion is irresistible, that the jurisdiction of the Circuit Court for the Eastern District of Oklahoma was not dependent "entirely" upon diverse citizenship; that the jurisdiction of that court attached for the reason that, by a statement in the bill of the facts in legal and logical form, such as is required by good pleading, it appears that the right or title set up by appellant might be defeated by one construction of the law of the United States, or sustained by the opposite construction, and that it therefore appears that this is a suit arising under the laws of the United States, and that therefore an appeal lies from the decision of the Circuit Court of Appeals to this Court.

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